No. 89-1598-CFX
Status: GRANTED

Title: Eastern Airlines, Inc., Petitioner
v.
Rose Marie Floyd, et vir, et al.

Docketed:
April 10, 1990

Court: United States Court of Appeals
for the Eleventh Circuit

Counsel for petitioner: Murray,John Michael

Counsel for respondent: Eaton,Joel D.

NOTE: See mail label re dock dt

Entry	Date	Note	Proceedings and Orders
1	Apr 10 1990	G	Petition for writ of certiorari filed.
2	Apr 30 1990		Brief of respondents Floyd, Rose, et vir, et al. in opposition filed.
3	May 8 1990		DISTRIBUTED. May 24, 1990
4	May 14 1990	X	Reply brief of petitioner Eastern Airlines filed.
6	May 25 1990		REDISTRIBUTED. May 31, 1990
7	Jun 4 1990		Petition GRANTED.
			**********
8	Jul 19 1990		Brief of petitioner Eastern Airlines filed.
9	Jul 19 1990		Joint appendix filed.
11	Jul 26 1990		Order extending time to file brief of respondent on the merits until September 5, 1990.
12	Sep 5 1990		Brief of respondents Rose Marie Floyd et vir, et al. filed.
13	Sep 19 1990		CIRCULATED.
14	Sep 25 1990		Record filed.
		*	Certified copy of original record and proceedings, 2 boxes, received.
15	Sep 26 1990		SET FOR ARGUMENT MONDAY, OCTOBER 29, 1990. (2ND CASE).
20	Sep 26 1990		SET FOR ARGUMENT MONDAY, OCTOBER 29, 1990. (2ND CASE)
16	Sep 27 1990	G	Application (A90-240) to extend the time to file a reply brief from October 9, 1990 to October 15, 1990, submitted to Justice Kennedy.
17	Oct 1 1990		Application (A90-240) granted by Justice Kennedy extending the time to file until October 12, 1990.
18	Oct 12 1990	X	Reply brief of petitioner Eastern Airlines filed.
19	Oct 15 1990		Letter from Counsel for the respondent received and distributed.
21	Oct 29 1990		ARGUED.

89- 1598

No.

in the Supreme Court of the United States

OCTOBER TERM, 1989

EASTERN AIRLINES, INC.,

Petitioner,

versus

ROSE MARIE FLOYD and
TERRY FLOYD, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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April 9, 1990

QUESTIONS PRESENTED

1. Whether, in view of the presumed liability under the Warsaw Convention for death, wounding or any other bodily injury, an air carrier is liable for fright, psychic injury or emotional distress absent objective bodily injury or absent any physical manifestation of injury?

2. Whether the Montreal Agreement, which modifies the Warsaw Convention and which eliminates an air carrier's "due care" defense, makes international air carriers the insurers of their passengers against any fright, psychic injury or emotional distress absent a showing of objective bodily injury or absent physical manifestations of injury?

LIST OF ALL PARTIES TO THE PROCEEDING

The parties to the proceedings below were the petitioner, Eastern Airlines, Inc.,[1] and the following plaintiffs below and respondents to this petition (listed as they appeared in the style of the case):

ROSE MARIE FLOYD and TERRY FLOYD, her husband, CONNIE GALE and MICHAEL GALE, her husband, MICHAEL GALE and CONNIE GALE, his wife, GLORIA PATTERSON, EDMOND PATTERSON, THOMAS J. NOLAN, ROBERT SCHARHAG, EUGENE H. CHAMP, FREDERICK W. HOEHLER IV, SALLY ANN COLLINS, MICHAEL R. DRAMIS, SANDY DIX and GARY DIX, her husband, DANA DIX, by and through her parents GARY DIX and SANDY DIX, as guardians and next friends, ALEXANDER DIX, by and through his parents GARY DIX and SANDY DIX, as guardians and next friends, GERRI ASH SEIF, SUSAN ROONEY and WILLIAM ROONEY, her husband, JANET JACOBS and BRUCE JACOBS, her husband, ALEXANDER EMBRY, SALIM KHOURY and DEBORAH KHOURY, his wife, BRUCE JACOBS and JANET JACOBS, his wife, MYRIAM CARRASCO (f/k/a MYRIAM RILEY), TERRY FLOYD and ROSE MARIE FLOYD, GARY DIX and SANDY DIX, his wife, SALIM KHOURY and DEBORAH KHOURY, his wife, GREGORY MANTZ, by and through his parents, NETTA MANTZ and HAROLD D. MANTZ, as guardians and next friends, NETTA MANTZ, HAROLD MANTZ, GREGORY D. MANTZ, by and through his father HAROLD D. MANTZ.

[1] In response to Rule 28.1, Petitioner Eastern states that it is a subsidiary of Texas Air Corporation and that the following is a list of Eastern's subsidiaries: Airport Ground Services Corporation, Dorado Beach Development, Inc., Dorado Beach Estates, Inc., EAL, Inc., EAL Properties, Inc., Eastern Airlines Leasing, Inc., Eastern Airlines of Puerto Rico, Inc., Ionosphere Clubs, Inc., JCSS Corporation, Protective Services Corporation, Terminal Sales Company.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, Eastern Airlines, Inc., ("Eastern") requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this action on May 5, 1989, which reversed a final judgment of the United States District Court for the Southern District of Florida.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1-54) is reported at 872 F.2d 1462. The opinion of the district court (Pet. App. B-1-21) is reported at 629 F.Supp 307.

JURISDICTION

The opinion of the court of appeals (Pet. App. A-1-2) was entered on May 5, 1989. A timely petition for rehearing with a petition for rehearing *en banc* was denied on January 11, 1990 (Pet. App. D-1-2). The jurisdiction of this Court rests upon 28 U.S.C. §1254 (1).

TREATY PROVISION INVOLVED

The treaty provision involved is Article 17 of the Warsaw Convention, which Convention is formally known as the Convention for the Unification of Certain Rules Relating To International Transportation By Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* 49 U.S.C.A. Section 1502 note (1970). Article 17 is set forth below:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

STATEMENT OF THE CASE

Respondents Floyd[1], were passengers on an Eastern flight from Miami, Florida to Nassau, Bahamas. Shortly after takeoff, one of the aircraft's three engines failed. The plane was turned around for a landing in Miami, and on the return, the aircraft's other two engines failed. As the aircraft lost altitude because of the engine failure, the passengers

[1]As there were 25 consolidated cases in this action, Eastern will refer to all of the plaintiff/respondents collectively as "Floyd".

and crew were prepared for ditching. The flight crew subsequently restarted one of the engines, and the aircraft safely landed at Miami International Airport.

Floyd brought actions for damages alleging mental pain and anguish, fright, distress and inability to lead normal lives as a result of the incident.[2] The complaints did not allege that plaintiffs suffered any bodily or physical injury or any physical manifestations of psychic injury.

The Warsaw Convention. The Convention is a treaty governing international aviation to which more than 120 nations now adhere. The Convention's primary purposes are to establish a uniform body of rules to govern international aviation and to set limits on carrier liability. *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243 (1984). The Convention applies to "*all* international transportation of persons, baggage, or goods performed by aircraft for hire." (Warsaw Convention, Article 1.) (Emphasis supplied.) It establishes uniform rules for passenger damage claims. *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 330 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968).

The controversy focuses upon the proper construction of Article 17 of the Convention, which creates a presumption of carrier liability for death or bodily injury as follows:

> The carrier shall be liable for damage sustained in the event of the death or **wounding of a**

[2]Another passenger on this flight whose case was not consolidated herewith, proceeded in a Florida state court. That case was recently decided by the Florida Supreme Court, *Eastern Airlines, Inc. v. King*, ____ So.2d ____, 15 F.L.W. 61 (Fla. Feb. 15, 1990) and is also reprinted in Pet. App. C-1-14. The allegations of that complaint are identical to the facts here. The Florida court determined that the plaintiff in *King* failed to state a claim under Florida law for intentional infliction of emotional distress, but followed the Eleventh Circuit Court of Appeals in *Floyd* in finding that the plaintiffs did have a claim for recovery under the Warsaw Convention for pure emotional injury unaccompanied by physical manifestations.

passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Since the text of the Convention is in the French language, the relevant French text is quoted as follows:

> Le transporteur est responsable du dommage survenu en cas de mort, **de blessure ou de toute autre lesion corporelle** subie par un voyageur lorsque l'accident qui a cause le dommage s'est produit a bord de l'aeronef ou au cours de toutes operations d'embarquement et de debarquement.

The phrase "lesion corporelle" is literally translated as "bodily injury." 49 Stat. 3014, reprinted at note following 49 U.S.C. Section 1502. The decision below broadly construed "lesion corporelle" to encompass recovery for fright, psychic injury or emotional distress unaccompanied by any "wounding. . .or any other bodily injury," and unaccompanied by physical manifestations of psychic injury. (App. A-22). The decision below expands an air carrier's liability well beyond that intended by the framers of the Convention.

The Montreal Agreement. Because of dissatisfaction in the United States with the Convention's low limits of liability,[3] the major international air carriers, at the urging of the United States State Department, met in Montreal, to increase their liability limits. This arrangement became known as the "Montreal Agreement."[4] It modifies the Convention only as the terms of the Convention permit it to be modified and only in accordance with the contracting carriers' intent.

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[3]The liability limit was fixed at $8,300 by the Convention. *Chan v. Korean Airlines, Ltd.*, ____ U.S. ____, 109 S.Ct. 1676, 1678 (1989).

[4]Officially titled: Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18900, 31 Fed.Reg. 7302 (1966), note following 49 U.S.C. App. §1502.

In the Montreal Agreement, the signatories agreed to include within their conditions of carriage and tariffs a provision raising the liability limit to $75,000 on international flights serving the United States. The parties further agreed to include a provision waiving the right to assert the "due care" defense of Article 20, "with respect to any claims arising out of the death, wounding or other bodily injury to a passenger. . . ." *See also, Day v. Trans World Airlines*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976).

Therefore, the Montreal Agreement is a special contract pursuant to Article 22(1) of the Convention between the airline signatories and their passengers imposing on air carriers liability for their passengers' bodily injuries *without a showing of fault*.[5] The Montreal Agreement did not amend Article 17; it did not modify the phrase "lesion corporelle." In fact, the drafters did not discuss or define the phrase "lesion corporelle" at either the Warsaw Convention or during the Montreal Agreement. *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385, 358 N.Y.S.2d 97, 105, 314 N.E.2d 848, 854 (N.Y. 1974). However, despite the fact that the parties to the Montreal Agreement did not intend to expand their liability under Article 17, the Eleventh Circuit's decision below has the effect of making air carriers absolutely liable for a broadened category of injuries without a showing of fault and without a showing of physical manifestations of injury.

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[5]An air carrier has been held absolutely liable for its passengers' death or bodily injuries occurring during an incident of international transportation even when the injuries were caused by a third party. *Day v. Trans World Airlines, Inc., supra*, 528 F.2d at 33 (2d Cir. 1975) (in suit against airline for damages resulting from terrorist attack, only inquiry was whether passengers were injured and whether they were injured on an international flight).

The defense of contributory negligence is still available under Warsaw Convention, Article 21. The death or bodily injury must be caused by an "accident." *Air France v. Saks*, 470 U.S. 392 (1985).

The Proceedings Below. The actions commenced in state court and were removed pursuant to the federal court's treaty jurisdiction and consolidated. (App. B-13). Floyd's complaints sought damages for purely emotional injury pursuant to four different theories of liability: three state law theories and one federal. The complaints contained counts for breach of contract, negligence, and entire want of care (or intentional tort). In the federal count, the complaint sought recovery pursuant to Article 17 of the Warsaw Convention. The complaints did not allege that any plaintiff sustained any physical or bodily injury or impact. Under Florida law, recovery for emotional distress caused by simple negligence requires allegations of discernible and demonstrable physical injury. *Brown v. Cadillac Motor Car Division*, 468 So.2d 903 (Fla. 1985). Recovery for intentional infliction of emotional distress is precluded unless the conduct is found to be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency. . . ." *Metropolitan Life Insurance Company v. McCarson*, 467 So.2d 277 (Fla. 1985); *Eastern Airlines, Inc. v. King*, at App. D. Therefore, Eastern moved for judgment on the pleadings based upon Floyd's failure to state a claim for which relief could be granted.[6]

The district court held that the allegations in the complaint failed to establish any intentional or willful misconduct on the part of Eastern in connection with its maintenance of the aircraft. Therefore, because recovery for mental distress pursuant to the breach of contract count and one of the two tort counts was dependent upon a finding of willful misconduct, the district court held that Floyd failed to state a cause of action. (App. B-2-13). As to the Warsaw Convention count, the district court, relying on *Burnett v. Trans World Airlines, Inc.*, 368 F.Supp. 1152 (D. N.M. 1973), concluded that "mental anguish alone is not compensable under the Warsaw Convention." (App. B-13).[7]

[6]Generally, the cause of action for mental distress contains certain safeguards, generally requiring, *inter alia*, a showing of physical injury, physical manifestation of psychic injury or some extreme or outrageous misconduct. Prosser & Keeton, *The Law of Torts*, 60-65, 359-361 (W. Keeton 5th ed. 1984).

The Eleventh Circuit reversed. As to the state law counts, the court held that it was bound by the decision of a Florida appellate court in a companion case holding that the allegations against Eastern stated a cause of action under Florida law for intentional infliction of emotional distress.[8] As to the Warsaw Convention count, it expressly rejected the analysis and conclusions of the New York Court of Appeals in *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385, 358 N.Y.S.2d 97, 314 N.E.2d 848 (N.Y. 1974) and the District of New Mexico in *Burnett v. Trans World Airlines, Inc.*, *supra*. It held that the "Convention provides recovery for purely emotional injuries unaccompanied by physical injury." (App. A-14). The court also held that a passenger could recover compensatory damages from an air carrier for pure emotional injury *in excess* of the $75,000 liability limits if the carrier acts with willful misconduct.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve a direct conflict involving the interpretation of a federal treaty. The Eleventh Circuit Court of Appeals and the New York Court of Appeals and the highest courts of Florida and New York are in conflict over an important question affecting all international air transportation. The Eleventh Circuit has construed the fundamental liability provision of the Convention to include recovery for pure emotional injury

[7]Absent allegations of discernible and demonstrable physical injury, the plaintiffs did not state a cause of action for negligent infliction of emotional distress. (App. B-4-5). The plaintiffs did not appeal the dismissal of their Florida breach of contract and negligence claims. (App. A-3).

[8]That decision was subsequently reversed. The Florida Supreme Court held that Eastern's conduct herein does not rise to intentional or willful and wanton misconduct. (App. C-1-14).

unaccompanied by physical injury or physical manifestations of psychic injury. Because under the Warsaw Convention and the Montreal Agreement an air carrier is presumptively and strictly liable for its passenger's accidental in-flight injuries, the decision below imposes upon international air carriers potentially unlimited, strict liability for its passengers' purely subjective emotional injuries. The liberal construction of the Warsaw Convention adopted by the Eleventh Circuit makes air carriers the insurers of their passengers against any emotional trauma. This construction is not supported by the language of the Convention or the Montreal Agreement. It seriously undermines the purposes of uniformity and limitation of liability that the Convention was designed to achieve.

I.

THE PANEL OPINION BELOW IS ADMITTEDLY IN DIRECT CONFLICT WITH THE NEW YORK COURT OF APPEALS' DECISION IN *ROSMAN V. TRANS WORLD AIRLINES* ON THE PROPER CONSTRUCTION OF THE WARSAW CONVENTION'S LIABILITY PROVISION.

The decision below is squarely in conflict with the New York Court of Appeals in *Rosman v. Trans World Airlines, Inc., supra,* 34 N.Y.2d 385, 358 N.Y.S.2d 97, 314 N.E.2d 848 (N.Y. 1974). Both courts interpret the terms of Article 17 to the Warsaw Convention, but the decision of the Eleventh Circuit effectively concludes that *any* emotional trauma, without accompanying physical injury, is compensable.

The Eleventh Circuit based its analysis on what it perceived to be the French legal meaning of "lesion corporelle." While noting that the issue has "confounded courts and commentators for many years. . .," the court nonetheless concluded that the phrase "bodily injury" includes any "personal" injury suffered by a person,

including "emotional injury unaccompanied by physical trauma." (App. A-29).

The court stated:

> ". . . [T]he drafters did not intend to exclude any particular category, common law or civil law, of damages. If they had, it seems likely that they would have referred to the two basic types of damages in French law, *dommage materiel* (bodily injury) and *dommage moral* (mental injury), rather than using the term *lesion corporelle,* which does not readily evoke a sharp distinction of French law."

(App. A-16 n. 16).

In a leap of logic, then the court concluded that language which encompasses both mental *and* physical injury permits recovery for mental injury *absent* physical injury.

Additionally, the Eleventh Circuit court relied heavily on *Husserl v. Swiss Air Transport Co.,* 388 F.Supp. 1238 (S.D. N.Y. 1975), the leading case holding that a passenger may recover for mental injury alone under Article 17. However, *Husserl* was decided before *Benjamins v. British European Airways,* 572 F.2d 913 (2d Cir. 1978). *cert. denied,* 439 U.S. 1114 (1979), which held that the Warsaw Convention creates a cause of action. Prior to *Benjamins,* the Second Circuit had held that the Warsaw Convention did not create a cause of action but merely imposed limits on state law causes of action. *Husserl* held that "mental injury alone should be compensable [under the Warsaw Convention], if otherwise applicable substantive [state] law provides an appropriate cause of action." 388 F.Supp. at 1251. The Eleventh Circuit ignores the fact that *Husserl* was decided in the context of state law remedies containing such safeguards on the recovery for pure emotional injury as the showing of physical injury, physical manifestation of psychic

injury or extreme or outrageous misconduct by the tortfeasor. Prosser & Keeton, *The Law of Torts*, 60-65, 359-361 (W. Keeton 5th ed. 1984). By imposing the *Husserl* holding onto the Warsaw Convention's no-fault liability regime, the Eleventh Circuit court has created an anomalous cause of action imposing on international air carriers virtual strict and potentially unlimited liability for what is essentially a subjective injury.

Squarely in conflict with *Floyd* is *Rosman v. Trans World Airlines, Inc.*, which involved an action to recover for mental distress resulting from an airplane hijacking. The *Rosman* court limited the air carrier's liability to those "palpable, objective bodily injuries, including those caused by the psychic trauma of the hijacking, and for the damages flowing from those bodily injuries, but not for the trauma as such or for the nonbodily or behavioral manifestations of that trauma." 314 N.E.2d at 857. In construing the words "bodily injury," the *Rosman* court stated:

> We deal with the term as used in an international agreement written almost 50 years ago, *a term which even today would have little significance in the treaty as an adjective modifying "injury" except to import a distinction from "mental"*. In our view, therefore, the ordinary, natural meaning of "bodily injury" as used in article 17 connotes palpable, conspicuous physical injury, and excludes mental injury with no observable "bodily", as distinguished from "behavioral", manifestations.

314 N.E.2d at 855. (Emphasis supplied.)

The effect of interpreting "lesion corporelle" as including emotional trauma unaccompanied by physical manifestations results in an "abandonment" of "the ordinary and natural meaning of the language of Article 17". *Id.* at 855.

Moreover, the *Rosman* court emphasized that, under the Montreal Agreement, "participating air carriers agreed to accept liability imposed upon them by Article 17 without fault." 314 N.E.2d at 851. The court thus posited the relevant issue as whether "by virtue of [an air carrier's] *absolute liability* for death or wounding . . . or any other bodily injury" Article 17 permitted recovery for purely emotional injury. (Emphasis supplied.) The court analyzed the issue in the context of the strict liability regime imposed upon air carriers under the Warsaw Convention and the Montreal Agreement, and properly declined to create a cause of action divorced from the traditional limitations attendant to the recovery for pure mental distress.

II.

THE FEDERAL AND STATE COURTS ARE IN DISARRAY OVER THE INTERPRETATION OF ARTICLE 17.

In addition to the conflict between *Floyd* and *Rosman* on the proper interpretation of Article 17, there exists direct conflict on the issue presented herein between two state courts of last resort. The New York Court of Appeals' decision in *Rosman* is in direct conflict on the issue with the Florida Supreme Court's decision in *Eastern Airlines, Inc. v. King*, (App. C-1-14). In a case arising out of the same incident involved *sub judice*, the Florida Supreme Court, in a conclusory opinion, held that Article 17 permits recovery for pure emotional injury. (App. C-8). The highest courts of Florida and New York are, therefore, in disagreement over the proper interpretation of Article 17.

Nor is the issue settled by *Rosman* for the state courts of New York. In *Palagonia v. Trans World Airlines*, 110 Misc.2d 478, 442 N.Y.S.2d 670 (N.Y. Sup. Ct. 1978), a hijacking case, a New York trial court declined to follow the ruling *of its own highest court* on the interpretation of Article 17. The *Palagonia* court did not deem itself bound by

the *Rosman* decision because that court had not held an evidentiary hearing on the issue of the French legal meaning of "lesion corporelle." After hearing conflicting evidence from experts, the court concluded that "'lesion corporelle' includes the concept of mental injury as a recoverable damage, even in the absence of a concomitant physical manifestation." *Id.* at 671.

Similarly, the federal district courts are in conflict over the issue and they offer a variety of rationales for their different conclusions. For example, the district court in *Burnett v. Trans World Airlines, Inc.*, 368 F.Supp. 1152 (D. N.M. 1973), like the state court in *Palagonia*, conducted an evidentiary hearing on the French legal meaning of the words "lesion corporelle." The court in *Burnett*, however, reached a result contrary to the *Palagonia* court, concluding that mental anguish alone was *not* encompassed within the French legal meaning of "lesion corporelle." 368 F.Supp. at 1156.

In conflict with *Burnett* are three decisions of the District Court for the Southern District of New York and one decision of the Central District of California. *Borham v. Pan American World Airways, Inc.*, No. 85 Civ. 6922 (CBM) (S.D. N.Y. 1986) (available in 19 Avi. Cas. 18,237 and on 1986 Westlaw 2974); *Karfunkel v. Compagnie Nationale Air France*, 427 F.Supp. 971 (S.D. N.Y. 1977); *Krystal v. British Overseas Airways Corporation*, 403 F.Supp. 1322 (C.D. Cal. 1975); *Husserl v. Swiss Air Transport*, 388 F.Supp. 1238 (S.D. N.Y. 1975). The *Husserl* court based its expansive reading of "lesion corporelle" on its conclusion that the Warsaw Convention did not preclude resort to state law remedies for types of damages not expressly enumerated in Convention. Therefore, a broad and inclusive reading of the types of injuries subject to the Convention's liability limitations, precluded resort to state law remedies and promoted the Convention's goals of uniformity and liability limitation.

Acting out of a similar concern, the court in *Karfunkel* followed *Husserl*, and concluded that:

> The goal of the Warsaw Convention was to create uniformity in actions for damages arising from international air accidents. Though there is an indicated difference of opinion on the question, it seems that better view that all claims for damages for personal injuries suffered by a passenger in an "accident", whether physical or mental, be resolved in one action under the Convention.

427 F.Supp. at 976-77.

The court in *Krystal* also followed *Husserl* but added an additional basis for its conclusion. In *Krystal*, the district court examined the actual Notice of the Convention's limitation required to be given passengers under the Montreal Agreement. The court found that the Notice included the wording "personal injury" instead of "bodily injury" and concluded that this clarified the intended meaning of the phrase in Article 17 to encompass recovery for purely emotional injury. 403 F.Supp. 1322.

Because of the complete disarray of the state and federal courts in resolving this fundamental issue involving a treaty, this Court should review the decision of the Eleventh Circuit Court of Appeals so that a uniform and consistent standard will be available to guide future courts and litigants.

III.

THE DECISION BELOW RAISES AN IMPORTANT QUESTION BECAUSE IT BROADLY CONSTRUES A TREATY PROVISION AND FUNDAMENTALLY INCREASES THE LIABILITY OF ALL INTERNATIONAL AIR CARRIERS SERVING THE UNITED STATES.

The decision below departs from this Court's rules for the proper construction of the Warsaw Convention. Recently, in *Chan v. Korean Air Lines, Ltd.*, ____ U.S. ____, 109 S.Ct. 1676, 1683-1684 n. 5, (1989), this Court held that the courts should be governed by the text of the Warsaw Convention, and that its most natural meaning controls unless contradicted by clear drafting history. In holding that "where the text [of the Warsaw Convention] is clear . . . we have no power to insert an amendment," this Court quoted Justice Story as follows:

> "[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this Court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops — whatever may be the imperfections or difficulties which it leaves behind." *The Amiable Isabella*, 6 Wheat 1, 71, 5 L.Ed 191 (1821).*

109 S.Ct. at 1683-1684.

*Also cited at 19 U.S. 1 (1821).

In a departure from this Court's rules for proper treaty construction, the Eleventh Circuit has ignored the clear and natural meaning of the phrase "bodily injury" and amended it to mean pure fright, mental distress or emotional injury absent bodily injury, impact or absent physical manifestations of injury. The Eleventh Circuit's holding is not supported by the "clear drafting history" of the Warsaw Convention. *See, e.g., Floyd,* (App. A-18) ("Unfortunately, the history of the drafting of the Warsaw Convention with respect to claims for mental injury is not helpful."). Instead, it relies upon cases containing the conflicting conclusions of experts who are in admitted disagreement on the proper construction of the words "bodily injury." *See: Palagonia v. Trans World Airlines, Inc.*, 110 Misc.2d 478, 442 N.Y.S.2d 670, 675 (N.Y. Sup. Ct. 1978) (noting scholarly disagreement over French legal meaning of "bodily injury"); *Husserl v. Swiss Air Transport Co.*, 388 F.Supp. 1238, 1250 (S.D. N.Y. 1975) (conflicting interpretations of the term "bodily injury" were unconvincing and inconclusive).

If allowed to stand, the decision below will have a substantial impact on all of international aviation. The purpose of the Convention "is uniformity among its diverse adherent Nations — the achievement, so far as possible, of a uniform body of law as to the various subject matters which are covered. The particular provisions limiting liability were designed to assure that only a regulated burden be borne by the air carriers." *Rosman, supra,* 358 N.Y.S.2d at 106, 314 N.E.2d at 854. The decision below undermines the Convention's purpose by imposing an absolute and potentially unlimited liability upon international air carriers for what is essentially a purely subjective and undemonstrable injury. It has been noted that "[m]ental disturbance is easily simulated, and courts which are plagued with fraudulent personal injury claims may well be unwilling to open the door to an even more dubious field." Prosser & Keeton, *The Law of Torts, supra,* at page 361. Nonetheless, the decision below imposes upon air carriers

absolute liability for fright, shock or other mental disturbances which are not marked by any definite physical symptoms capable of clear medical proof. It imposes such liability in a context which does not require a showing of fault or degree of misconduct. And it imposes such liability in absence of the traditional safeguards which separate the spurious from the meritorious claims. Conceivably, every hypersensitive individual with a fear of flying could make a claim against an airline for the discomfort experienced on a flight beset by turbulence. Historically, the law has been reluctant to redress fright or shock:

> The temporary emotion of fright, so far from serious that it does no physical harm, is so evanescent a thing, so easily counterfeited, and usually so trivial, that the courts have been quite unwilling to protect the plaintiff against mere negligence, where the elements of extreme outrage and moral blame which have had such weight in the case of the intentional tort context are lacking.

Prosser & Keeton, *The Law of Torts, supra,* at page 361.

The Eleventh Circuit has created a cause of action which opens wide the door to litigation, subjecting international air carriers to the flood of fictitious or frivolous claims.

IV.

THE COURT MAY DESIRE TO CONSIDER AN ADDITIONAL QUESTION CONCERNING WHETHER THE WARSAW CONVENTION IS THE EXCLUSIVE PASSENGER REMEDY FOR ACCIDENTAL INJURIES OCCURRING IN INTERNATIONAL AIR TRANSPORTATION.

If this Court grants certiorari to decide the Article 17 question, it may wish to address the related question, left

undecided in *Air France v. Saks,* 470 U.S. 392 (1985), of whether the Warsaw Convention provides the exclusive grounds for carrier liability to an airline passenger injured in an in-flight accident.

In *Benjamins v. British European Airways,* 572 F.2d 913, 919, the Second District held that the Warsaw Convention creates a cause of action and provides the "universal source of a right of action" for passengers injured in international air transportation. *See, e.g.: Johnson v. American Airlines, Inc.,* 834 F.2d 721, 723 (9th Cir. 1987) (suggesting exclusivity in stating that the Warsaw Convention "applies to *all* cases in which aircraft is hired to transport someone or something on an international route.") (Emphasis in original); *Boehringer-Mannheim Diagnostics v. Pan American World Airways,* 737 F.2d 456, 459 (5th Cir. 1984) (Warsaw Convention preempts the field for damaged cargo claims in international transportation).

Other courts have held that the Warsaw Convention is exclusive where it applies but suggest that it narrowly preempts only those state laws in conflict with it. *In Re Aircrash in Bali, Indonesia on April 22, 1974,* 684 F.2d 1301, 1307 (9th Cir. 1982) (Congress did not intend for the Convention to preempt the field but it preempts state law which "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.").

There is, therefore, a direct conflict among the courts of appeal over whether the Warsaw Convention preempts the field and provides the exclusive source of air carrier liability for damages sustained in international air transportation. The question of the Warsaw Convention's exclusivity is intertwined with the question of whether Article 17 comprehends recovery for purely mental or emotional injury. Courts which have read Article 17 broadly have often done so out of a concern that damages not comprehended by the Convention may give rise to state created causes of action not subject to any of the Convention's conditions or limits.

See, e.g., Karfunkel v. Compagnie Nationale Air France, supra, 427 F.Supp. at 976-77; *Husserl v. Swiss Air Transport Company, Ltd., supra,* 388 F.Supp. at 1246. An expansive reading of the types of injury comprehended by Article 17 has been deemed to advance the Convention's purpose of limiting air carrier liability. *Husserl,* 388 F.Supp. at 1246-47. Thus, the courts have been forced into the broad interpretation of Article 17 out of a persistent concern that the Warsaw Convention would otherwise be wholly circumvented and undermined by resort to state law causes of actions. This Court can resolve this dilemma by holding that the Warsaw Convention constitutes the exclusive source of air carrier liability for loss or injury suffered in international transportation. The Court should address this issue to provide needed guidance in future cases.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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April 9, 1990

Appendix

INDEX TO APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-5381

D.C. Docket No. 83-1949

ROSE MARIE FLOYD and TERRY FLOYD, her husband, CONNIE GALE and MICHAEL GALE, her husband, MICHAEL GALE and CONNIE GALE, his wife, GLORIA PATTERSON, EDMOND PATTERSON, THOMAS J. NOLAN, ROBERT SCHARHAG, EUGENE H. CHAMP, FREDERICK W. HOEHLER, IV, SALLY ANN COLLINS, MICHAEL R. DRAMIS, SANDY DIX and GARY DIX, her husband, DANA DIX, by and through her parents GARY DIX and SANDY DIX, as guardians and next friends, ALEXANDER DIX, by and through his parents GARY DIX and SANDY DIX, as guardians and next friends, GERRI ASH SELF, SUSAN ROONEY and WILLIAM ROONEY, her husband, JANET JACOBS and BRUCE JACOBS, her husband, ALEXANDER EMBRY, SALIM KHOURY and DEBORAH KHOURY, his wife, BRUCE JACOBS and JANET JACOBS, his wife, MYRIAM CARRASCO (f/k/a MYRIAM RILEY) TERRY FLOYD and ROSE MARIE FLOYD, GARY DIX and SANDY DIX, his wife, SALIM KHOURY and DEBORAH KHOURY, his wife, GREGORY MANTZ, by and through his parents, NETTA MANTZ and HAROLD D. MANTZ, as guardians and next friends NETTA MANTZ, HAROLD MANTZ, GREGORY D. MANTZ, by and through his father HAROLD D. MANTZ,

Plaintiffs-Appellants,

versus

EASTERN AIRLINES, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

(May 5, 1989)

Before JOHNSON and ANDERSON, Circuit Judges, and ATKINS*, Senior District Judge.

ANDERSON, Circuit Judge:

This case presents difficult questions of interpretation of the Warsaw Convention. It also presents a difficult question concerning a Florida state law cause of action for intentional infliction of emotional injury; however, this court is bound by the state court's resolution of this issue. The case also presents issues relating to preemption of the state law cause of action. Because we hold that the district court erred in its construction of the Warsaw Convention, we reverse its judgment and remand with instructions. In addition, we reverse the district court's refusal to grant leave to two plaintiffs to amend their complaints.

I. FACTS

Eastern Airlines flight 855 left Miami en route to Nassau, Bahamas on the morning of May 5, 1983. During the flight, one of the airplane's three engines lost oil pressure. The crew shut down the ailing engine and headed back to Miami. Shortly thereafter, the second and third engines failed. Without power, the plane began losing altitude, and the crew told the passengers that they would have to ditch the plane in the Atlantic Ocean. Fortunately, the crew managed to restart the engine that had initially failed and to land the plane safely at Miami International Airport.

The plaintiffs in the twenty-five consolidated cases before us today were passengers on flight 855. Except for two cases discussed below, they have brought suit claiming

*Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

damages solely for mental distress arising out of this incident. These claims are grounded on two theories.[1] The first is a cause of action for intentional infliction of emotional distress under Florida law.[2] The second arises under the Warsaw Convention.[3] The United States District Court for the Southern District of Florida granted judgment on the pleadings in favor of Eastern, holding that the plaintiffs failed to state a claim upon which relief could be granted under either Florida or federal law. *In re Eastern Airlines, Inc., Engine Failure, Miami International Airport on May 5, 1983*, 629 F.Supp. 307 (S.D.Fla. 1986). In considering plaintiffs' appeal, then, we look only to the face of the complaint and must accept its allegations as true.[4]

We address in turn plaintiffs' state law claim for intentional infliction of emotinoal distress (Part II), the cause of action under the Warsaw Convention for emotional injury (Part III), preemption (Part IV), plaintiffs' claim for punitive damages pursuant to Article 25 of the Warsaw Convention (Part V.A.), preemption of plaintiffs' state law

[1]The plaintiffs also brought breach of contract and negligence claims under Florida law, but they did not appeal the district court's dismissal of those claims.

[2]The parties agree, and the district court held, that Florida law governs plaintiffs' claim for intentional infliction of emotional distress. *In re Eastern Airlines, Inc., Engine Failure, Miami International Airport on May 5, 1983*, 629 F.Supp. 307, 309 n.1 (S.D.Fla. 1986).

[3]Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, October 12, 1929, adhered to by the United States June 27, 1934, 49 Stat. 3000, 3014, reprinted in 49 U.S.C. note following § 1502. We shall refer to this treaty by its more popular and less cumbersome name, the Warsaw Convention.

[4]The plaintiffs have represented to this court that their complaints are identical in all respects material to this appeal. Since Eastern has not challenged this representation, we accept it as true. We work from the complaint in the Floyd case, and any references to "the complaint" are to that one, except in Part VII, *infra*.

claim for punitive damages (Part V.B.), guidance on remand with respect to willful misconduct under the Warsaw Convention (Part VI), and denial of leave to amend the complaints of two plaintiffs (Part VII).

II. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM

Plaintiffs alleged that Eastern's maintenance personnel responsible for Flight 855 had failed to install the required oil seals or "O-rings" necessary to prevent oil leaks; that Eastern's records revealed that its aircraft had experienced a dozen prior engine failures stemming from the absence of O-rings; and that Eastern knowingly failed to institute appropriate procedures to correct the problem. The plaintiffs sought damages for intentional infliction of emotional distress based upon these allegations under Florida law.

In a case arising out of the same incident as the cases before us today, the Florida Third District Court of Appeal sitting *en banc* held that plaintiffs' allegations stated a cause of action under Florida law. *King v. Eastern Airlines, Inc.*, 536 So.2d 1023 (Fla. 3d D.C.A. 1987).[4] This court is bound by that interpretation of Florida law in the absence of some persuasive indication that the Florida Supreme Court would hold otherwise. *Bradbury v. Wainwright*, 718 F.2d 1538, 1540 (11th Cir. 1983); *Silverberg v. Paine, Webber, Jackson & Curtis, Inc.*, 710 F.2d 678, 690 (11th Cir. 1983). We note that on March 9, 1989, the Supreme Court of Florida accepted jurisdiction in the *King* case.[5] For purposes of this

[4]The Florida court also held that plaintiffs' claims did not state a cause of action under federal law, the Warsaw Convention. 532 So.2d at 1074-76. The parties concede that this Court is not bound by that aspect of the Florida court's holding.

[5]The Court has set oral argument in *King* for June 8, 1989. *King v. Eastern Airlines, Inc.*, Order Accepting Jurisdiction and Setting Oral Argument, Case No. 73,395 (Fla. Mar. 9, 1989).

opinion only, we assume that the law of Florida is as enunciated by the Third District Court of Appeals. However, on remand the district court will be bound by the decision of the Supreme Court of Florida on the issue of the state law cause of action for intentional infliction of emotional distress.

III. WARSAW CONVENTION CLAIM

In their amended complaints, plaintiffs assert a claim for damages under the Warsaw Convention. The Convention is an international treaty to which the United States is a party. *Air France v. Saks*, 470 U.S. 392, ____, 105 S.Ct. 1338, 1341 (1985). Most of the major countries of the world adhere to the Warsaw Convention, including the Bahamas, the intended destination of Flight 855. *See* Lee S. Kreindler, 1 *Aviation Accident Law* § 11.01[3] at 11-7 (1988) (listing countries which are parties to the Convention). The Convention applies to "all international transportation of persons, baggage, or goods performed by aircraft for hire." Warsaw Convention Art. 1.

The Warsaw Convention was the result of two international conferences, held in Paris in 1925 and Warsaw in 1929, and of the work done in the interim by the Comité International Technique d'Experts Juridiques Aériens ("CITEJA"). *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 326-27 (5th Cir. 1967) (discussing background of Warsaw Convention), *cert. denied*, 392 U.S. 905 (1968). At that time, commercial air travel was in its infancy, but "[c]ommon rules to regulate international air carriage ha[d] become a necessity." *Minutes, Second International Conference on Private Aeronautical Law, October 4-12, 1929, Warsaw* 13 (English translation by Robert C. Horner and Didier Legrez 1975) ("*Minutes*") (address of Mr. Lutostanski, head of the Polish delegation).

The conference at Warsaw had two goals. First, to establish uniformity as to documentation such as tickets and

waybills, and procedures for dealing with claims arising out of international transportation. *See Minutes* at 85, 87. The second, and more important at the time, goal of the conference was to limit the potential liability of air carriers in the event of accidents and lost or damaged cargo. *See Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, ____, 104 S.Ct. 1776, 1784 (1984); *Minutes* at 37; Andreas F. Lowenfeld and Allan I. Mendelsohn, *The United States and The Warsaw Convention*, 80 Harv.L.Rev. 497, 498-99 (1967) ("Lowenfeld and Mendelsohn"). The Convention established a presumption that air carriers are liable for damage sustained by passengers as a result of the carrier's negligent conduct, but strictly limited this liability to 125,000 Poincaré francs, approximately 8,300 dollars. Warsaw Convention Art. 17, 20, 22.

Proponents put forth several reasons in support of the strict limitations on air carrier liability. First, they pointed out that such limits on liability were not unknown in the law, and drew an analogy to maritime law with its global limitation of a shipowner's liability which enables it to obtain necessary capital. In addition, a limitation on liability provided necessary protection of a financially weak industry and ensured that catastrophical risks would not be borne by the air carriers alone. Furthermore, the limit allowed for the inability of carriers to insure against such great risks while admitting that passengers could obtain insurance themselves. Finally, the liability limitation sought to avoid litigation by facilitating quick settlements and establishing a uniform law with respect to the amount of recoverable damages. *See* H. Drion, *Limitation of Liabilities in International Air Law* 12-44 (1954). Whatever the validity of these arguments today,[7] the liability limitation was and remains an integral feature of the Warsaw scheme.

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[7]*See* Kreindler, 1 *Aviation Accident Law* §11.01[6] at 11-13; Comment, *Warsaw Convention Liability Limitations: Constitutional*

(Footnote continued on next page)

While the air carriers clearly were the chief beneficiaries of the Warsaw system, passengers also received some benefits. Article 23 of the Convention invalidated any attempt by the carrier tending to relieve it of liability or to fix a limit lower than that of the Convention. The Convention also shifted the burden of proof in an accident so that the carrier was presumed negligent unless it could show that it had taken all necessary measures to avoid damages or that it was impossible for it to take such measures. Warsaw Convention Art. 20. In addition, Article 25 provided that the carrier would not be able to invoke the liability limitation in cases where a plaintiff is able to prove "willful misconduct." Respected commentators have noted that "[t]he essential bargain was a shift in the burden of proof in return for a limit of liability (except in cases of willful misconduct) set at 8,300 dollars per person." Lowenfeld and Mendelsohn, 80 Harv.L.Rev. at 500; *Minutes* at 47, 51.[8]

The United States did not participate in the drafting of the Convention; it had only sent observers to Warsaw. *Minutes* at 10. After serveral countries ratified the Convention, however, the United States pronounced its adherence to the Warsaw Convention in 1934. On June 15, 1934, the Senate approved the Convention by voice vote. 78 Cong.Rec. 11,582 (1934); *see* Lowenfeld and Mendelsohn, 80 Harv.L.Rev. at 502.

The Convention provoked sharp debate and criticism in the United States and throughout the world almost immediately after it went into effect, and many proposals to revise it were put forth. *See* Lowenfeld and Mendelsohn, 80

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Issues, 6 Nw.J.Int'l L. & Bus. 896 (1984); Comment, *The Growth of American Judicial Hostility Towards the Liability Limitations of the Warsaw Convention*, 48 J. Air L. & Com. 805 (1983).

[8]In 1966, air carriers serving the United States agreed to waive their due care defenses and increase the amount of their liability to $75,000 in the Montreal Agreement, which we discuss *infra*.

Harv.L.Rev at 502; Stuart M. Speiser and Charles F. Krause, 1 *Aviation Tort Law* § 11.17 at 669-70 (1978 and 1988 Supp.) ("Speiser and Krause"). The parties to Warsaw met at the Hague in 1955 to consider revising the Convention. The principal effect of the Hague Protocol was to double the liability limit to approximately $16,600. Hague Protocol Art. XI, *reprinted in* Andreas F. Lowenfeld, *Aviation Law Documents Supp.* 958-59 (2d ed. 1981). Opponents expressed continuing dissatisfaction with the limit of liability even under Hague, and the United States has never adhered to the Hague Protocol. *See Reed v. Wiser*, 555 F.2d 1079, 1083-88 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977).

This dissatisfaction with the Warsaw regime led to the United States' formal denunciation of the Convention pursuant to Article 39 in November 1965. *See* 31 Fed.Reg. 7302 (1966). The notice of denunciation led to intense negotiations culminating in the Montreal Agreement[9] of 1966.[10] At Montreal the airlines entered into an "interim solution" (that has lasted over twenty years) whereby airlines agreed to raise the limit of liability to $75,000 and waive the due care defenses of Article 20 for flights originating, terminating, or having a stopping point in the United States. Lowenfeld and Mendelsohn, 80 Harv.L.Rev. at 602. The Montreal Agreement is not a treaty, but rather an agreement among all major international air carriers that imposes a quasi-legal and largely experimental system of liability essentially contractual in nature. *Krystal v. British Overseas Airways Corp.*, 403 F.Supp. 1322 (C.D.Cal. 1975).

[9]Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18900, approved by CAB Order No. E-28680, May 13, 1966, 31 Fed.Reg. 7302 (1966).

[10]For a detailed discussion of the events leading up to Montreal and the Montreal Agreement itself, see Lowenfeld and Mendelsohn, 80 Harv.L.Rev. 497. The authors represented the United States State Department at Montreal.

Other international conferences have taken place since Montreal in an attempt to revise the Warsaw regime, *see* Speiser and Krause § 11.20 at 680-83, Lowenfeld, *Aviation Law Documents Supp.* at 975-1022, but today the United States remains subject to the terms of the original Warsaw Convention, as modified by the Montreal Agreement. *See* Kreindler, 1 *Aviation Accident Law* § 11.01[7] at 11-16. It is ironic that the delegates at Warsaw in no way considered their work definitive. Mr. Amedeo Giannini, Head of the Italian Delegation at Warsaw, stated that what the delegates were doing was "nothing but a first try at codification, a first effort to codify aeronautical law." *Minutes* at 32.

The Warsaw Convention is a self-executing treaty which requires no implementing legislation by the signatories. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252, 104 S.Ct. 1776, 1783 (1984). Therefore, we must look to the terms of the Warsaw Convention itself to determine whether Eastern can be held liable to the plaintiffs in this case for their alleged emotional injuries.

A. *The Cause of Action Under Warsaw*

At the outset, we accept those cases holding that the Warsaw Convention itself creates a cause of action. In the years immediately following the United States' adherence to the Convention, most courts and commentators assumed that Article 17 created a cause of action. *See Salamon v. Koninklijke Luchtvaart Maatschappij, N.V.*, 107 N.Y.S.2d 768, 773 (Sup.Ct. 1951), *aff'd mem.* 281 App.Div. 965, 120 N.Y.S.2d 917 (1st Dept. 1953) ("[i]f the Convention did not create a cause of action in Art. 17, it is difficult to understand just what Art. 17 did do"); James M. Grippando, *Warsaw Convention—Federal Jurisdiction and Air Carrier Liability for Mental Injury: A Matter of Limits*, 19 Geo.Wash.J.Int'l L. & Econ. 59, 64-65 (1985); Lowenfeld and Mendelsohn, 80 Harv.L.Rev. at 517.

Two seminal Second Circuit decisions in the 1950's, however, held that the Warsaw Convention did not create a cause of action. *Komlos v. Compagnie Nationale Air France*, 209 F.2d 436 (2d Cir. 1953), *cert. denied*, 348 U.S. 820 (1954); *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957). Courts followed these decisions for two decades, and most commentators assumed the question to be closed, although not without criticizing the decisions. *See* Lowenfeld and Mendelsohn, 80 Harv.L.Rev. at 516-19; G. Nathan Calkins, Jr., *The Cause of Action Under the Warsaw Convention*, 26 J.Air L. & Com. 217, 323 (1959).

Upon reexamination of these decisions, a careful analysis of the minutes of the Convention, and an analysis of the goals of the Warsaw regime, however, the Second Circuit reversed itself in *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979). Judge Lumbard, author of the of the *Noel* decision, wrote the opinion for the court holding that the Warsaw Convention itself did create a cause of action for wrongful death under Article 17 and for lost baggage under Article 18. Other courts of appeals soon followed. *See Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 737 F.2d 456 (5th Cir. 1984), *cert. denied*, 469 U.S. 1186 (1985); *Abramson v. Japan Airlines Co.*, 739 F.2d 130 (3d Cir. 1984), *cert. denied*, 470 U.S. 1059 (1985); *In re Mexico City Air Crash of October 31, 1979*, 708 F.2d 400 (9th Cir. 1983). *See also* Note, *The Warsaw Convention—Does it Create a Cause of Action?*, 47 Fordham L.Rev. 366 (1978). While the Supreme Court has not expressly decided the issue, it implicitly has adopted the view that the Warsaw Convention itself creates a cause of action. In one of only three cases[11] construing the Warsaw Convention, the Court

[11]The other Supreme Court cases on the Warsaw Convention addressed the Convention's gold-based liability limits for lost cargo, *(Footnote continued on next page)*

held in *Air France v. Saks*, 470 U.S. 392, 105 S.Ct. 1338 (1985), that an airline passenger who became permanently deaf allegedly because of negligent maintenance and operation of the aircraft's pressurization system was not a victim of an "accident" for which the airline could be held liable under Article 17 of the Warsaw Convention. While Saks' original complaint stated a cause of action for negligence under state law, the Court ruled only on her allegations under Warsaw. 470 U.S. at ____, 105 S.Ct. at 1347.

In *St. Paul Insurance Co. v. Venezuelan International Airways, Inc.*, 807 F.2d 1543, 1546 (11th Cir. 1987), a panel of this court held that Articles 18, 21, and 28 of the Convention created a cause of action against international air carriers for lost cargo. We extend this holding to Article 17 of the Convention as well, and hold that Article 17 creates a cause of action for personal injury.

B. *Article 17*

Having concluded that the Warsaw Convention creates a cause of action, we now turn to the difficult question of interpreting the provisions of the Convention. Article 17 of the Convention sets forth the liability of international air carriers for injuries to passengers. Plaintiffs assert that Article 17 of the Convention provides a remedy for the injuries that they allegedly suffered—i.e., psychic injuries and emotional distress unaccompanied by physical injury.

In assessing the validity of their claim, we are required to determine the French legal meaning of the Convention's

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Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, ____, 104 S.Ct. 1776 (1984), and the question whether an airline may assert the $75,000 Convention limitation on liability if the limitation is printed on passenger tickets in smaller type size than that specified in the Convention. *Chan v. Korean Air Lines, Ltd.*, 490 U.S. ____, 57 U.S.L.W. 4432 (April 18, 1989).

terms.[12] *Air France v. Saks*, 470 U.S. 392, ____, 105 S.Ct. 1338, 1342 (1985); *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 330 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968).[13] The French text of the Warsaw Convention is the only official text and the one officially adopted and ratified by the Senate. *See Minutes* at 15 (resolution designating French as official language of the conference). The unofficial United States translation, which appears at 49 Stat. 3014, was made by the State Department. *See Palagonia v. Trans World Airlines, Inc.*, 110 Misc.2d 478, 442 N.Y.S.2d 670, 672 (Sup.Ct. 1978). The Supreme Court stated that the French legal meaning controls

> not because "we are forever chained to French law" by the Convention, but because it is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties. We look to French legal meaning for guidance as to these expectations because the Warsaw Convention was drafted in French by continental jurists.

Saks, 470 U.S. at ____, 105 S.Ct. at 1342 (citations omitted). *See also* Dana Stanculescu, *Recovery for Mental Harm Under Article 17 of the Warsaw Convention: An Interpretation of Lésion Corporelle*, 8 Hastings Int'l and Comp.L.Rev. 339, 347-350 (1985).

The original French text of Article 17 reads as follows:

> Le transporteur est responsable du dommage survenu en cas de mort, de blessure, ou de toute autre lésion corporelle subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit à bord de l'aérnoef au cours de toutes opérations d'embarquement et de débarquement.

The unofficial United States translation of Article 17 is as follows:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3014, reprinted at note following 49 U.S.C. § 1502.

The incident here clearly occurred on board the aircraft. *Cf. Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976); Note, *Warsaw Convention—Air Carrier Liability for Passenger Injuries Sustained Within a Terminal*, 45 Fordham L.Rev. 369 (1976). The district court held that the loss of power and preparation for ditching on Flight 855 was an "accident" for Article 17 purposes, and Eastern has not contested that ruling. 629 F.Supp. at 312; *see Saks*, 470 U.S. at ____, 105 S.Ct. at 1345 ("accident" defined as an "unexpected or unusual happening or event that is external to the passenger").

The crucial issue, then, is whether the phrase *lésion corporelle* encompasses purely emotional distress. The question whether Article 17 encompasses recovery for purely mental injuries has confounded courts and commentators for many years. An early commentary on the Warsaw Convention pointed out that Article 17 "is full of pitfalls and obscurities," and noted that "it is not clear if mental injury

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[12]The French legal meaning of the Warsaw Convention is properly before us today. The district court discussed the issue, 629 F.Supp. at 312-14, and all parties clearly were on notice that this question of French law was relevant to the case. The briefs on appeal also addressed the issue. *See* Fed.R.Civ.P. 44.1; Charles Alan Wright and Arthur R. Miller, 9 *Federal Practice & Procedure* §2443 at 403 (1971 and 1988 Supp.).

[13]This case was decided prior to the close of business on September 30, 1981, and is binding precedent under *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

is covered by the Article." K.M. Beaumont, *Need for Revision and Amplification of the Warsaw Convention*, 16 J.Air L. & Com. 395, 401-02 (1949).

Based upon our interpretation of the French legal meaning of the text, the concurrent and subsequent legislative history, and the case law, we conclude that the Convention provides recovery for purely emotional injuries unaccompanied by physical injury.

1. French legal meaning of the text

Because the Warsaw Convention was drafted in French and reflects a civil law liability regime, we must look to the French legal meaning of *lésion corporelle* to determine whether it contemplates recovery for mental anguish unaccompanied by physical trauma. After careful review of the cases and commentary on the meaning of *lésion corporelle*, we are persuaded that the term covers any "personal" injury — i.e., any injury suffered by the plaintiff as a person. *See Palagonia v. Trans World Airlines, Inc.*, 110 Misc.2d 478, 442 N.Y.S.2d 670, 673 (Sup.Ct. 1978); Rene H. Mankiewicz, *The Liability Regime of the International Air Carrier* 145-46 (1981) ("Mankiewicz").[4] This includes emotional injury unaccompanied by any physical trauma.

While the use of the word *corporelle* would, if read literally, appear to imply that recovery for *dommage mentale* is unavailable, we are persuaded that this literal reading is unwarranted. *Cf. Burnett v. Trans World Airlines, Inc.*, 368 F.Supp. 1152, 1156 (D.N.M. 1973) (applying literal French translation of *lésion corporelle* to exclude recovery for mental anguish). The literal translation of *lésion corporelle* does not fully capture its French legal meaning. *Palagonia*, 442 N.Y.S.2d at 673. *See* Mankiewicz at 141 (1981) ("While 'bodily injury' is undoubtedly a grammatically correct translation of *lésion corporelle*, it may

[4]Dr. Mankiewicz is an internationally known expert on the Warsaw Convention and aviation law. *See Palagonia*, 442 N.Y.S.2d at 672.

rightly be argued that the meaning of that expression in French law and its equivalents in other civil laws are more correctly rendered by the expression 'personal injury'."). Our study of the issue has convinced us that there is nothing in French law prohibiting compensation for any particular kind of damage, including emotional trauma, provided the damage is certain and direct. *See* Barry Nicholas, *French Law of Contract* 219-26 (1982); Marcel Plainol and George Ripert, 2 *Treatise on the Civil Law* No. 249 at 150-51 (11th ed. 1959) (Louisiana State Law Institute translation).

Nor can it be said that the express mention of the word *corporelle* by implication excludes what is *mentale*. One commentator points out that *dommage corporelle* in French law includes physical, mental, and moral damage, as well as any pecuniary loss resulting from personal injury. Georgette Miller, *Liability in International Air Transport* 122-23 (1977) ("Miller").

There is no counterpart in French law to the common law doctrine which distinguishes between physical injury (compensable), and purely mental or emotional injury unaccompanied by physical injury (not compensable). To the contrary, French law permits recovery for any damage whether material or moral. *Palagonia*, 442 N.Y.S.2d at 673; Mankiewicz at 145, 157; Miller at 112-15. This includes damages such as medical expenses, funeral expenses, lost earnings, and pain and suffering. Mankiewicz at 157. It also includes recovery for mental suffering unaccompanied by physical injury. Mankiewicz at 145. *See also* Yvonne Blanc-Dannery, *La Convention de Varsovie et les règles du transport aérien international* 62 (Paris 1933), *quoted in* Mankiewicz at 146 ("[t]he use of the expression *lésion* after the words 'death' and 'wounding' encompasses and contemplates cases of traumatism and nervous troubles, the consequences of which do not immediately become manifest

in the organism but which can be related to the accident.").[15] *See also Palagonia*, 442 N.Y.S.2d at 673 (relying on Blanc-Dannery dissertation).[16]

The wording of Article 17 strongly suggests that the drafters did not intend to exclude any particular category of damages. If *lésion corporelle* was intended to refer only to injury caused by physical impact, it is likely that the civil law experts who drafted the Warsaw Convention in 1929 would not have singled out and specifically referred to a particular case of physical impact such as *blessure* ("wounding").[17] *See* Mankiewicz at 146.

The terms of the Convention must be construed broadly in order to advance its goals. *See Stratis v. Eastern Air Lines, Inc.*, 682 F.2d 406, 412 (2d Cir. 1982); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 35 (2d Cir. 1975) ("a relatively broad construction of Article 17 is in harmony with modern theories"), *cert. denied*, 429 U.S. 890 (1976); *Preston v. Hunting Air Transport, Ltd.*, 1 Q.B. 454, 1 All Eng.Rep. 443, 1 Lloyd's Rep. 45 (1956) (Article 17 read to encompass not merely financial loss, but also loss suffered by children after their mother killed in air crash). One clear goal of the Convention is to maintain uniformity. *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 330 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968). It would clearly contravene this goal of uniformity for courts of the United States to import into Warsaw Convention jurisprudence the common law doctrine espoused by Eastern when that doctrine has no foundation in French law.

2. Concurrent and subsequent legislative history of the Warsaw Convention and conduct of the parties

While analysis of any treaty or international agreement must begin with the text of the document and the context in which the written words are used, *see Maximov v. United States*, 373 U.S. 49, 53-54, 83 S.Ct. 1054, 1057-58 (1963), it is proper to refer also to records of its drafting and negotiation when interpreting a treaty when the text is subject to

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[15]The Blanc-Dannery thesis was written under the supervision of Dean Georges Ripert, a leading French delegate at Warsaw. *Minutes* at 6 (listing French delegation). The Second Circuit has referred to Ripert as the "dean of French writers on civil law." *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976). *See also Block v. Compagnie Nationale Air France*, 386 F.2d 323, 328 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968).

[16]While French law does not draw the sharp distinction that the common law does between emotional injuries and injuries resulting from physical trauma, it does recognize two types of legally cognizable injuries: physical injuries *(dommage materiel)* and non-physical injuries *(dommage moral)*. Miller at 125. *Dommage materiel* consists of pecuniary loss resulting from injury, such as compensation for expenses or financial loss resulting from injury or death, medical and funeral expenses, and loss of earning power or income. *Dommage moral* refers to intangible losses such as pain and suffering, invasion of privacy, or disfiguration. Mankiewicz at 157. *See also* Simeon Moquet Borde & Associes, 1 Doing Business in France § 8.02[2][b] at 8-6 (1988) (physical injuries are those which are caused to the person or property of the injured person; non-physical injuries include the pain and suffering of the injured party himself, the injury caused to the honor or emotions of the injured party (e.g. slander or the mental suffering resulting from the death of a spouse) or the loss of consortium). An accident victim generally can claim recovery for both *dommage materiel* and *dommage moral* under French law, as long as the victim can prove that the accident was the direct cause of his or her injuries. Mankiewicz at 157; Marcel Plainol and George Ripert, 2 *Treatise on the Civil Law* No. 867-868A at 470-73 (11th ed. 1959) (Louisiana State Law Institute translation). Bodily injuries, as well as mental injuries, can be compensated as *dommage moral* without any other distinction as to the origin of the injury. Miller at 126. As we have discussed, the wording of Article 17 strongly suggests that the drafters did not intend to exclude any particular category, common law or civil law, of damages. If they had, it seems likely that they would have referred to the two basic types of damages in French law, *dommage materiel* and *dommage moral*, rather than using the term *lesion corporelle*, which does not readily evoke a sharp distinction of French law. Miller at 125.

[17]*But see Burnett v. Trans World Airlines, Inc.*, 368 F.Supp. 1152, 1156 (D.N.M. 1973) (court rejected the argument that the term *blessure* itself as used in Article 17 encompassed emotional injury). *See Husserl v. Swiss Air Transport Co.*, 351 F.Supp. 702, 708 (S.D.N.Y. 1972) ("*Husserl I*"), *aff'd* 485 F.2d 1240 (2d Cir. 1973).

conflicting interpretations. *Saks*, 470 U.S. at ____, 105 S.Ct. at 1343. "[T]reaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32, 63 S.Ct. 672, 677-78 (1943). *See Cook v. United States*, 288 U.S. 102, 53 S.Ct. 305, 308 (1933). As Judge Wisdom stated in *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 330 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968), "the determination in an American court of the meaning of an international convention drawn by continental jurists is hardly possible without considering the conception, parturition, and growth of the convention."

Unfortunately, the history of the drafting of the Warsaw Convention with respect to claims for mental injury is not helpful. *See Husserl v. Swiss Air Transport Co.*, 388 F.Supp. 1238, 1249 (S.D.N.Y. 1975) ("Husserl II"); *Burnett v. Trans World Airlines, Inc.*, 368 F.Supp. 1152, 1156-57 (D.N.M. 1973); *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385, 358 N.Y.S.2d 97, 105 (1974); Grippando, 19 Geo.Wash.J.Int'l L. & Econ. at 84-85. The drafters of the Convention in 1929 did not discuss whether Article 17 encompassed recovery for mental injuries. *See generally Minutes*. The Senate did not address the issue when it adhered to the Convention in 1934. *See* 78 Cong.Rec. 11,577-82 (1934).

Subsequent action by the contracting countries to the Warsaw Convention, however, supports the conclusion that Article 17 encompasses recovery for mental anguish. When interpreting a treaty, reference to the subsequent interpretations by its signatories is appropriate to help determine the meaning of an ambiguous provision. *Air France v. Saks*, 470 U.S. at ____, 105 S.Ct. at 1344. The conduct of the parties of a treaty is relevant in ascertaining the proper construction to accord the treaty's provisions. *Id.*; *Pigeon River Improvement Slide & Boom Co. v. Charles W.*

Cox, Ltd., 291 U.S. 138, 158-63, 54 S.Ct. 361, 366-67 (1934); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 35-36 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976).

Actions by the contracting states suggest that the translation of *lésion corporelle* as "bodily injury" may have placed too narrow a meaning on the French term. For example, one commentator has pointed out that the official German translation of Article 17 rendered the term *lésion corporelle* as "any infringement on the health . . . ." This translation may more correctly reflect the understanding of the expression *lésion corporelle* by the delegates at Warsaw. Mankiewicz at 146.

The signatory airlines at Montreal in 1966 did not discuss whether Article 17 provided recovery for mental injury. Andreas F. Lowenfeld, *Hijacking, Warsaw, and the Problem of Psychic Trauma*, 1 Int'l L.J. of Syracuse 345, 347-48 (1973). The focus concerned raising the limit of liability to $75,000 and the carriers' agreement to waive their due care defense. However, the Montreal Agreement used language which is relevant. In paragraph 1 of the Agreement, the airlines agreed to include certain language in their conditions of carriage — "[t]he limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of $75,000." In paragraph 2, the airlines agreed to include certain language on each ticket as a notice to passengers — "the liability of . . . [name of carrier] . . . for death or personal injury to passengers is limited in most cases to proven damages not to exceed $75,000 per passenger." The Civil Aeronautics Board Order which approved the terms of the Montreal Agreement also uses the term "personal injury" interchangeably with the term "bodily injury" when referring to compensable injuries under the Warsaw regime.[18] 31 Fed.Reg. 7302 (1966). The

[18]The CAB order uses the phrase "death, wounding, or other bodily injury" three times. The phrase "personal injury" is repeated four times. 31 Fed.Reg. 7302 (1966).

actual notice issued by the airlines to passengers uses the term "personal injury." *See Krystal v. British Overseas Airways Corp.*, 403 F.Supp. 1322, 1323 (C.D.Cal. 1975). The court in *Krystal* found this to be dispositive on the question whether Article 17 encompassed claims for purely psychic injury. On the other hand, a participant at the Montreal conference has asserted that "no legal significance should be attached to this change in wording, which was occasioned solely by the need to draft an intelligible notice in readable type in the space provided by a ticket booklet." Lowenfeld, 1 Int'l L.J. of Syracuse at 347 n.7.

While we do not find the change in wording on the ticket form or the interchangeable uses of "bodily injury" and "personal injury" to be dispositive, neither do we completely discount them. It seems clear to us that there is significance in the fact that the Montreal Agreement itself and the Civil Aeronautics Board Order use the two terms interchangeably. It is also significant that the only document which is actually delivered to passengers informs them that the airline's liability is limited in cases of death or "personal injury," not merely "bodily injury." This is evidence of "the conduct of the parties to the Convention and the subsequent interpretations of the signatories" which, according to the Supreme Court in *Saks*, 470 U.S. at ____, 105 S.Ct. at 1344, helps clarify the meaning of the terms. *See also Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975) (construing Warsaw Convention in light of Montreal Agreement), *cert. denied*, 429 U.S. 890 (1976); *Board of County Commissioners of Dade County, Florida v. Aerolineas Peruanasa, S.A.*, 307 F.2d 802, 806-07 (5th Cir. 1962) (must consider intent of the parties in construing treaty such as the Warsaw Convention), *cert. denied*, 371 U.S. 961 (1963); *St. Paul Insurance Co. v. Venezuelan International Airways, Inc.*, 807 F.2d 1543, 1546 (11th Cir. 1987). Thus, we consider this evidence as another factor in favor of allowing recovery for mental injuries.

In addition, the authentic English text of Article 3(1)(c) of the Convention, as amended at The Hague, used the expression "personal injury," while the authentic French text of the amended article retained the expression "*lésion corporelle*." Hague Protocol Art. III, reprinted in Lowenfeld, *Aviation Law Documents Supp.* at 956. *See* Mankiewicz at 141, 178.

Another important piece of subsequent "legislative history" is the Guatemala City Protocol. *Air France v. Saks*, 470 U.S. at ____, 105 S.Ct. at 1344-45 (using Guatemala City Protocol to interpret meaning of "accident" in Article 17); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976). The Protocol was drafted in three authentic texts, English, French, and Spanish, although in cases of conflict the French text is to be controlling. Guatemala City Protocol Art. XXVI, *reprinted in* Lowenfeld, *Aviation Law Documents Supp.* at 984. The English text of the Protocol has substituted "personal injury" for "wounding or other bodily injury" in the translation of Article 17. The French text has retained the expression *lésion corporelle*. The fact that an official English translation of Article 17 made by the drafters at the Hague differs from the unofficial American translation made by the State Department casts doubt on the accuracy of the unofficial American translation. *See* Miller at 123.

The United States Senate has not ratified the Guatemala City Protocol,[9] so it is important not to

[9]The Guatemala City Protocol was drafted in such a way as to prohibit its ratification without the United States' assent, in order to avoid a repetition of the Hague Protocol situation. *See* Mankiewicz at 9-10. The fact that the Senate has not ratified these modifications of the Warsaw system is attributable to a reluctance to accept any damage limitations at all, not from a desire to limit recoverable damages to purely physical injury. *See* 129 Cong.Rec. S2237, S2270-79 (Daily ed. March 8, 1983); *In re Korean Air Lines Disaster of September 1, 1983*, 664 F.Supp. 1463, 1469-70 (D.D.C. 1985), *aff'd*, 829 F.2d 1171 (D.C. Cir. 1987), *aff'd*

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overestimate its importance. Grippando, 19 Geo.Wash.J.Int'l L. & Econ. at 85 n. 158; Speiser and Krause § 11.20 at 680-83. Nor has the Senate ratified the Hague Protocol or Montreal Protocols 3 and 4,[20] which also would have adopted the change in wording of the English translation of Article 17 from "wounding . . . or any other bodily injury" to "personal injury." While these Protocols "do not govern the disposition of this case" because of the lack of Senate ratification, nevertheless they are evidence of "the conduct of the parties and the subsequent interpretations of the signatories." *Saks*, 470 U.S. at ____, 105 S.Ct. at 1344. This evidence provides additional support for the conclusion that the French legal meaning of *de mort, de blessure, on de toute autre lésion corporelle* is "death or personal injury" rather than "bodily injury."

3. Cases interpreting Article 17

Prior judicial construction of Article 17, while helpful, often has been flawed. In the 1970's an explosion of terrorist activities led to litigation over the type of injuries compensable under Article 17. Hijackers often did not

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sub nom. Chan v. Korean Air Lines, Ltd., 490 U.S. ____, 57 U.S.L.W. 4432 (April 18, 1989); Lee S. Kreindler, *A Plaintiff's View of Montreal*, 33 J.Air L. & Com. 528, 528-29 (1967); Grippando, 19 Geo.Wash.J.Int'l L. & Econ. at 85-86 n.158. *See also Reed v. Wiser*, 555 F.2d 1079, 1087 (2d Cir.) (discussing Hague Protocol, court stated that "the only reason for the United States' refusal to ratify it was its dissatisfaction with the low level of the carriers' liability limitations, not the other provisions of the Protocol."), *cert. denied*, 434 U.S. 922 (1977).

[20]Drafted in 1975, Montreal Protocols 3 and 4 were intended to amend the Warsaw Convention as amended by the Hague and Guatemala City Protocols. Montreal Protocol No. 3 replaced the Poincare franc, in which limits of liability had been expressed, with the Special Drawing Right of the International Monetary Fund. Montreal Protocol No. 4 was intended to align the air carrier's liability for the carriage of goods with that established for the carriage of passengers and registered baggage by the Guatemala City Protocol. *See* Kreindler, *Aviation Law Documents Supp.* at 985-1001.

physically harm passengers, but the passengers of hijacked aircraft understandably experienced extreme terror and psychological trauma. Courts were thus presented with the difficult question whether the Warsaw Convention contemplated recovery for psychological injuries alone. *See* Kreindler, 1 *Aviation Accident Law* § 11.03[2][b] at 11-42.

Several cases have held that Article 17 of the Convention does not allow recovery for purely emotional or psychological injuries unaccompanied by physical trauma. Probably the leading proponent of that view is *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385, 358 N.Y.S.2d 97 (1974), in which the New York Court of Appeals held that mental injury was not compensable under Warsaw in the absence of physical trauma. The plaintiffs in *Rosman* were passengers aboard a TWA flight which was hijacked while en route from Tel Aviv, Israel, to New York and forced to land in the desert near Amman, Jordan. The passengers were held captive for six days by armed Arab guerillas, but were ultimately released by their captors and returned to New York. The plaintiffs claimed that they suffered extreme psychic trauma as well as physical harm due to the harsh desert conditions. The court held that their claims for recovery based solely on psychic injury were not compensable under Article 17. 358 N.Y.S.2d at 110. The court reasoned that the ordinary meaning of "bodily injury," as opposed to mental injury, connoted "palpable, conspicuous physical injury." 358 N.Y.S.2d at 107. "Only by abandoning the ordinary and natural meaning of the language of article 17," the court argued, "could we arrive at a reading of the terms 'wounding' or 'bodily injury' which might comprehend purely mental suffering without physical manifestations." 358 N.Y.S.2d at 107.[21]

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[21]Two cases have addressed actions for mental anguish not involving a hijacking. In *Kalish v. Trans World Airlines, Inc.*, 89 Misc.2d 153, 390 N.Y.S.2d 1007 (1977), the Civil Court of the City of New York, Queens County, followed *Rosman* and held that a plaintiff who was trampled by

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The *Rosman* analysis was flawed, however, because it failed to consider the French legal meaning of the language in Article 17. The court noted that there was "absolutely no dispute over the proper translation of the liability provisions of the Convention," 358 N.Y.S.2d at 103, and that French law therefore was irrelevant in interpreting the Convention once a proper translation was agreed upon. 358 N.Y.S.2d at 105. In light of the Supreme Court's holding in *Saks* that the French legal meaning must govern our interpretation of Warsaw, and in light of the considerable negative commentary of *Rosman's* approach, we must reject the *Rosman* analysis. *See Saks*, 470 U.S. at ____, 105 S.Ct. at 1342; Mankiewicz at 141-45; Miller at 117-22; J. Kathryn Lindauer, *Recovery for Mental Anguish Under the Warsaw Convention*, 41 J.Air. L. & Com. 333, 336-38, 340 (1975).

Another case which held that psychic injury unaccompanied by physical trauma is not compensable under the Warsaw Convention is *Burnett v. Trans World*

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other passengers who stepped on and jostled her after panic ensued among passengers trapped inside an airliner with an engine on fire was entitled to recover for mental and emotional trauma resulting from her experience.

Also, the Kentucky Court of Appeals held that a passenger cannot recover damages for mental anguish under the Convention arising out of losing a suitcase and its contents. *Trans World Airlines, Inc. v. Christophel*, 500 S.W.2d 409 (Ky.App. 1973). *Christophel* did not involve an "accident" within the meaning of Article 17 and hence has no application here.

It is important to note that today we hold only that Article 17 authorizes recovery for mental anguish unaccompanied by physical trauma only when there has been an "accident" sufficient to trigger the application of Article 17. We express no opinion on claims for mental distress not falling within the confines of Article 17. *See* Grippando, 19 Geo.Wash.J.Int'l L. & Econ. at 60 n. 5; J. Kathryn Lindauer, *Recovery for Mental Anguish Under the Warsaw Convention*, 41 J.Air. L. & Com. 333, 333 n.2 (1975) (noting the possibility of actions for mental distress not based on an "accident").

Airlines, Inc., 368 F.Supp. 1152 (D.N.M. 1973). The court in *Burnett* applied the French language meaning of "bodily injury," and determined that the definition of *lésion corporelle* was "l'atteinte a l'integrite physique" ("an infringement of physical integrity"). This definition, the court stated, "gives not the slightest indication that mental injuries are to be included within its domain." 368 F.Supp. at 1156. The court also rejected the plaintiffs' contention that *blessure* encompasses mental anguish. The court reasoned that

> The critical words of Article 17, "mort, de blessure, and ou de toute autre lesion corporelle" must be examined together in order to ascertain their contextual meaning. Although the *French-English Dictionary of Legal Terms* by Jules Jeraute defines "blessure" to include not only a wound but also hurt or injury, when the term is modified by the subsequent phrase of the provision, it seems apparent that the drafters utilized the word in solely a physical sense.

368 F.Supp. at 1156. The court in *Husserl v. Swiss Air Transport Co.*, 351 F.Supp. 702, 708 (S.D.N.Y. 1972) ("*Husserl I*"), *aff'd per curiam* 485 F.2d 1240 (2d Cir. 1973), based on similar reasoning, also stated in dicta that mental anguish alone is not compensable under Article 17. The district court in this case relied almost exclusively on *Burnett* in reaching its conclusion that Article 17 does not allow recovery for mental injury. 629 F.Supp. at 313-14.

While the court in *Burnett* purported to apply the French *legal* meaning of Article 17, 368 F.Supp. at 1155, it actually considered only the *linguistic* meaning of the French words of Article 17 at issue. *See* Kreindler, 1 *Aviation Accident Law* § 11.03[2][b] at 11-43. We therefore find its analysis unpersuasive. Furthermore, the plaintiffs' action in *Burnett* was founded on state law, 368 F.Supp. at

1153, not on the Warsaw Convention itself, which also places its conclusion on somewhat uncertain footing.

The court in *Burnett* also considered prior drafts of the Convention in concluding that the Convention did not encompass recovery for purely emotional injuries. Eastern asks us to apply those drafts the way the *Burnett* court did, but we view the drafting history of the Convention somewhat differently than do Eastern and the *Burnett* court. The First International Conference on Private Air Law, the predecessor to the Warsaw Convention, initially stated that "[t]he carrier is liable for accidents, losses, breakdowns and delays."[22] The *Burnett* court stated that this language would encompass recovery for both physical and mental injuries, quoting remarks by a French scholar which stated that French law at the time contemplated recovery against a common carrier:

> even in the cases where the carrier in failing to perform its contractual obligations infringed the emotional condition of the passenger: his sentiments of affection in delaying his arrival at funeral ceremonies, the comfort to which he is entitled by placing him in a baggage car, and even for the simple inconvenience of delay in arrival.

Henri Nazeaud, Leon Mazeaud, and Andre Tunc, *Traité Théorique et Pratique de la Responsabilité Civile Délictuelle et Contractuelle* 416-17 (5th ed. 1957), *quoted in Burnett*, 368 F.Supp. at 1157.

The preliminary draft of the Convention itself, adopted in May 1928 by the CITEJA, the interim committee formed after the Paris Conference of 1925, placed all sources of liability against the carrier in one article, Article 21, which provided that:

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[22] "Le transporteur est responsable des accidents, pertes, avaries et retards." *See Burnett*, 368 F.Supp. at 1157 (quoting French translation).

> The carrier shall be liable for damage sustained during carriage:
>
> (a) in the case of death, wounding, or any other bodily injury suffered by a traveler;
>
> (b) in the case of destruction, loss, or damage to goods or baggage;
>
> (c) in the case of delay suffered by a traveler, goods, or baggage.

Warsaw Convention, Preliminary Draft, reprinted in *Minutes* at 264-65.[23] The court in *Burnett* placed great emphasis on this change, stating that

> By thus restricting recovery to bodily injuries, the inference is strong that the Convention intended to narrow the otherwise broad scope of liability under the former draft and preclude recovery for mental anguish alone. Had the

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[23] The French translation of proposed Article 21 read as follows:

> Le transporteur est responsable du dommage survenu pendant le transport:
>
> (a) en cas de mort, de blessure ou de toute autre lesion corporelle subie par ur voyageur;
>
> (b) en cas de destruction, perte ou avarie de marchandises ou de bagages;
>
> (c) en cas de retard subi par un voyageur, des merchandises ou des bagages.

See Miller at 124 n. 74; *Burnett*, 368 F.Supp. at 1157 (reprinting translation).

In the final version of the Convention, the former Article 21 was split into three articles governing carrier liability for injuries to persons, damage or loss of goods, and delay, Articles 17, 18, and 19. The drafters viewed this change purely as a matter of form, and did not intend the change to effect actual carrier liability. *See Minutes* at 84, 205-06 ("it's not a question of new articles but of a new numbering of the articles") (remarks of Mr. Giannini, President of the Drafting Committee).

> delegates desired otherwise, there would have been no reason to so substantially modify the proposed draft of the First Conference.

368 F.Supp. at 1157. We believe the court in *Burnett* was too literal in its interpretation of the new language and overemphasized the importance of the change in wording, at least with regard to the type of compensable injuries. There is no evidence in the negotiating history of the Convention suggesting that the drafters intended to foreclose recovery for any particular type of injury; the drafters simply did not discuss the issue of whether purely emotional injury would be compensable under the Convention. To conclude that this drafting change dealt with a question as important as the exclusion of particular forms of damages, as the court in *Burnett* did, is to place far too much weight on an ambiguous piece of the drafting history of the Convention. *See* Miller at 123-25.

There is a more fundamental problem with the *Rosman* and *Burnett* analysis, the analysis that Eastern urges upon this court. In drawing a sharp distinction between injury caused by physical impact and purely mental injury, the courts in *Rosman* and *Burnett* have taken the common law's distinction between mental and physical injuries[11] and

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[11]"The common law has long been reluctant to award recovery for mental disturbance. Three principal concerns prompted this judicial concern: (1) the problem of permitting recovery for harm that is often temporary in nature; (2) the danger that such claims will be feigned; and (3) the perceived unfairness of imposing heavy burdens upon a defendant for harm the consequences of which appear remote from the wrongful act. W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, David G. Owen, *Prosser and Keeton on Torts* § 54 at 360-61 (5th ed. 1984) ("Prosser"). This concern resulted in the "impact rule," which allowed recovery for emotional injury only if accompanied by some physical infringement upon the plaintiff's person. There has been a continuous relaxation of the impact rule in the United States. *See, e.g., Battalla v. State of New York*, 10 N.Y.2d 237 (1961) (holding that mental anguish standing alone could be compensated); Prosser § 54 at 362-65 (noting development of the law);

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imposed it on Article 17 of the Warsaw Convention, a creation of civil lawyers. *See, e.g., Minutes* at 66, 85; *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 331 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968). As demonstrated earlier in this opinion, there is no such distinction in French law or other civil law systems. We are convinced that *Rosman* and *Burnett* inappropriately imported the common law doctrine.

Other cases have held that Article 17 of the Warsaw Convention does contemplate recovery for mental anguish unaccompanied by physical trauma.

The leading case in this line of cases is *Husserl v. Swiss Air Transport Co.*, 388 F.Supp. 1238 (S.D.N.Y. 1975) ("*Husserl II*"). In *Husserl II*, the court rejected the argument that the French legal meaning of Article 17 governs recovery for mental anguish, and concluded that conflicting interpretations of the term "bodily injury" were "unconvincing and inconclusive." 388 F.Supp. at 1250. The court looked to the purposes of the Warsaw Convention and the intent of its drafters to delineate a comprehensive international scheme of recovery and concluded that

> To effect the treaty's avowed purpose, the types of injuries enumerated should be construed expansively to encompass as many types of injury as are colorably within the ambit of the enumerated types. Mental and psychosomatic injuries are colorably within that ambit and are, therefore, comprehended by Article 17.

388 F.Supp. at 1250.

We agree with the court's conclusion in *Husserl II* that Article 17 encompasses recovery for mental injury, but the

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Lindauer, 41 J.Air L. & Com. at 342 (noting that "the impact rule has been overruled in almost every jurisdiction").

Supreme Court's mandate in *Saks* requires us to analyze more deeply the French legal meaning of Article 17. Furthermore, *Husserl II* was decided before *Benjamins v. British European Airways*, 572 F.Supp. 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979), and its analysis was based on the premise that the Warsaw Convention merely imposed limits on state law causes of action. The court held that "mental injury alone should be compensable, if the otherwise applicable substantive law provides an appropriate cause of action." 388 F.Supp. at 1251. *See also Tarar v. Pakistan International Airlines*, 554 F.Supp. 471, 480 (S.D.Tex. 1982).[25] For the reasons set forth above, we cannot subscribe to this analysis. The *Husserl II* court's statements regarding the policies and goals of Warsaw, however, are instructive.

Other courts have followed *Husserl II* but have added little to its analysis. *See Borham v. Pan American World Airways*, 19 Aviation Cases 18,236 (CCH) (S.D.N.Y. March 5, 1986); *Karfunkel v. Compagnie Nationale Air France*, 427 F.Supp. 971 (S.D.N.Y. 1977); *Krystal v. British Overseas Airways Corp.*, 403 F.Supp. 1322 (C.D.Cal. 1975).

The court in *Palagonia v. Trans World Airlines, Inc.*, 110 Misc.2d 478, 442 N.Y.S.2d 670, 675 (Sup.Ct. 1978), engaged in an exhaustive analysis of the French legal meaning of Article 17, relying on expert testimony to conclude that *lésion corporelle* includes mental injury as recoverable damage even absent physical trauma. Eastern

[25]Plaintiffs cite *Tarar* for the proposition that Article 17 authorizes the recovery of damages for mental distress and other purely psychic trauma. Eastern correctly points out that *Tarar* arose under Article 19 of the Warsaw Convention which deals with damages due to delay in transporting passengers, baggage, or goods. In addition, the court in *Tarar* held that the Warsaw Convention did not create a cause of action and applied Texas law in determining that the plaintiffs stated a cause of action for intentional infliction of emotional distress when the air carrier was negligent in transporting the remains of plaintiffs' decedent to his homeland. 554 F.Supp. at 478-80.

argues that *Palagonia* demonstrates only that there is some scholarly disagreement over the meaning of Article 17, and correctly points out that the court did not examine the prior and subsequent history of the Convention in arriving at its conclusion. However, we have studied those materials and find that they support *Palagonia's* analysis and conclusion that mental injury alone is recoverable. We find the *Palagonia* analysis persuasive.

Finally, we conclude that our interpretation is supported by the policies underlying the Convention. Our interpretation is consistent with the policy of the Convention to provide a comprehensive scheme of rules governing international air travel. *Husserl II*, 388 F.Supp. at 1250. It is also consistent with the important goal of the Convention to ensure uniformity, both in matters of documentation and matters of liability. *Id.* at 1250. Were we to accept Eastern's contention that Article 17 does not encompass recovery for emotional trauma, the plaintiffs nonetheless might[26] be able to successfully pursue their state law cause of action for intentional infliction of emotional distress. *See* Part II, *supra*. Such a state law cause of action would not be uniformly available. More important, this

[26]We emphasize that we expressly do not decide whether the state law cause of action would be preempted if we had held that the Warsaw Convention does *not* encompass a cause of action for purely mental injury. That preemption issue is different from the one we address in Part IV. That is, in Part IV, we decide that there is preemption in light of our holding that the Convention does create a cause of action encompassing purely mental injury. The preemption issue we do not decide is more difficult and subtle than the one we do decide, and in fact in a related case the District Court of Appeal of Florida, Third District, has held that air travelers may "avail themselves of remedies available under local law when the Warsaw Convention fails to provide a cause of action." *King v. Eastern Airlines, Inc.*, 536 So.2d 1023, 1031 (1987). Our statement in text that plaintiffs *might* be able to pursue their state law cause of action without a $75,000 limit on liability is of course a possibility only if the Florida court is correct.

might[27] put the plaintiffs in position to recover damages for emotional trauma which exceeded the $75,000 limit set by the Montreal Agreement. It hardly seems consistent with the intent of the Convention to place a strict cap of $75,000 on damages for death or harm resulting from physical impact while allowing unlimited recovery for purely emotional or psychological injuries.

4. Summary

After careful consideration of the French legal meaning of the treaty terms, the concurrent and subsequent legislative history and conduct of the parties, the case law and the policies underlying the Warsaw Convention, we are persuaded that Article 17 provides recovery for purely mental injuries unaccompanied by physical trauma. It is important to note that this does not mean that courts will allow recovery for every claim for mental injury up to $75,000. The damages actually sustained by the plaintiffs must be proved.

IV. PREEMPTION

We are bound by the Florida court's decision that the facts of this case state a claim under Florida law for intentional infliction of emotional distress.[28] Part II, *supra*. In addition, we hold today that Article 17 creates a cause of action for emotional injuries unaccompanied by physical trauma. Part III, *supra*. Because both state law and the Warsaw Convention may allow recovery for these alleged injuries, we are asked to determine whether the Convention preempts the plaintiffs' state law cause of action.

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[27] *See* note 26, *supra*.

[28] If the Supreme Court of Florida, which has accepted jurisdiction over the *King* case, holds that a cause of action for intentional infliction of emotional distress does not exist under Florida law, the district court will be bound by that holding on remand. Of course, if there is no state law cause of action, there would be no question of preemption. Our discussion of the preemption issue would become moot. *See* Part II, *supra*.

Plaintiffs argue that Article 17 of the Convention does not preempt all remedies available to an international air traveler; rather, they contend, it excludes recovery based on local law only for injuries which are inconsistent with the Warsaw Convention. The plaintiffs concede, as they must, that where local law conflicts with the Convention, the rules of the Convention must prevail. Eastern contends that the Warsaw Convention provides the exclusive avenue of recovery for passengers involved in an "accident" within the meaning of Article 17, and thus that all of plaintiffs' state law claims are barred.

As an international treaty accepted by the United States, the Warsaw Convention is binding. *Dalton v. Delta Airlines, Inc.*, 570 F.2d 1244, 1246 (5th Cir. 1978). The Supremacy Clause of the United States Constitution provides that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S.Const.art.VI. Any state law in conflict with a treaty of the United States is invalid. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157-58, 98 S.Ct. 988, 994 (1978). Therefore, the Warsaw Convention preempts any state law which is inconsistent with it. *Highlands Insurance Co. v. Trinidad and Tobago (BWIA International) Airways Corp.*, 739 F.2d 536, 537 n. 2 (11th Cir. 1984) ("Warsaw Convention preempts local law in areas where it applies"); *Burnett v. Trans World Airlines, Inc.*, 368 F.Supp. 1152, 1155 (D.N.M. 1973).

Courts have not hesitated to apply this principle in Warsaw Convention cases. In *Butler v. Aeromexico*, 774 F.2d 429 (11th Cir. 1985), for example, this court held that the district court did not err in awarding compensatory damages to crash victims when Alabama wrongful death law provided only for recovery of punitive damages. The court stated that

Alabama law "conflicts with the tenor of the Warsaw Convention, which contemplates compensation for victims of air disasters." 774 F.2d at 431. *See In re Aircrash in Bali, Indonesia On April 22, 1974*, 684 F.2d 1301, 1307-08 (9th Cir. 1982) (court held that "California law is preempted by the Warsaw Convention to the extent that California law would prevent the application of the Convention's limitation on liability"), *later appeal*, No. 86-6453, 1989 U.S. App. LEXIS 3725 (9th Cir. Mar. 27, 1989); *Kapar v. Kuwait Airways Corp.*, 845 F.2d 1100, 1104 (D.C.Cir. 1988) ("admiralty cases involving international air transportation *must* satisfy the Convention's requirements") (emphasis in original). These cases and the Supremacy Clause itself squarely stand for the proposition that when state law conflicts with a provision of the Warsaw Convention, the rules of the Convention must govern.

Conversely, where the Warsaw Convention does not apply at all — for example, to an injury suffered after disembarkation[29] — causes of action based on state law can go forward. The Convention does not prohibit state or federal causes of action based on situations which the Convention was not intended to govern. The title of the Convention itself suggests that it was not intended to cover the entire relationship between air carriers and passengers — the Convention was to unify "Certain Rules Relating to International Transportation by Air," not *all* rules relating to international transportation by air. The delegates to the Convention carefully chose to include this qualification in the title.[30] In those aspects of the passenger-carrier

[29] *See Martinez Hernandez v. Air France*, 545 F.2d 279 (1st Cir. 1976), *cert. denied*, 430 U.S. 950 (1977).

[30] *Minutes* at 188 (statement of Mr. Giannini, President of the drafting committee) ("We have adopted the title: 'Convention for the Unification of Certain Rules Relating to International Carriage by Air'. This suffices to say that this Convention does not provide for the entire matter and gives satisfaction to certain delegations such as the

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relationship which the Convention does not address, it does not apply at all, and local law must govern. *See* Mankiewicz at 13-15.

Courts considering this question have adhered to this distinction, often permitting claims against air carriers to proceed on other grounds after concluding that the Warsaw Convention did not apply.[31] *See* Kreindler, 1 *Aviation Accident Law* § 11.07 at 11-93,94; *Abramson v. Japan Airlines Co., Ltd.*, 739 F.2d 130 (3d Cir. 1984) (where Article 17 of the Warsaw Convention was not applicable because there was no "accident," the court held that there was no preemption of plaintiff's state law cause of action for negligent failure to assist a sick passenger suffering from an attack associated with a preexisting hernia condition), *cert. denied*, 470 U.S. 1059 (1985).[32]

We easily conclude that this case falls in the first category — i.e., it is a case where the Convention applies and

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Czechoslovak Delegation, which asked that the word 'Certain' be added."). *See Minutes* at 134-35; 176; 182-83 (statements emphasizing that the Convention was not intended to govern completely international air transportation).

[31] This is the approach taken by the Florida Court of Appeals in the *King* case. After it held that the Convention did not create a cause of action for emotional injury, the court held that the Convention did not preempt the state law claim for intentional infliction of emotional distress. *See* 532 So.2d at 1075-76.

[32] *See also Wogel v. Mexicana Airlines*, 821 F.2d 442 (7th Cir.) (action for discriminatory "bumping" from flight; held that since plaintiffs sought damages for the bumping itself under the Federal Aviation Act rather than incidental damages due to delay, the claims fell outside the scope of the Warsaw Convention), *cert. denied* ____ U.S. ____, 108 S.Ct. 291 (1987); *Schmidkunz v. Scandinavian Airlines System*, 628 F.2d 1205, 1207 (9th Cir. 1980) (reaching plaintiff's negligence claim after disposing of her Warsaw claim); *Martinez Hernandez v. Air France*, 545 F.2d 279, 284 (1st Cir. 1976) (holding that passenger injured after disembarkation is left "to remedies of local law"), *cert. denied*, 430 U.S. 950 (1977).

preempts inconsistent local law. The engine failure in question was an "accident" within the meaning of the Convention, and we have determined in Part III that Article 17 applies in this case and provides recovery for mental injuries unaccompanied by physical impact. Where the Convention applies, it preempts any inconsistent state law provision. *Butler v. Aeromexico*, 774 F.2d 429 (11th Cir. 1985). Plaintiffs' brief concedes, and we agree, that Eastern will be entitled to invoke the $75,000 per passenger limitation and that the other provisions of the Convention will apply. Therefore, to the extent that the cause of action for intentional infliction of emotional distress recognized under Florida law conflicts with the cause of action we recognized under Article 17 of the Convention, Florida law is preempted.

Eastern suggests that we hold that the Convention provides the exclusive source of a right to recovery and thus completely preempts state law causes of action in accidents involving international air transportation. At this stage of the case, however, we determine only that the Convention preempts those aspects of plaintiffs' state law claims which are inconsistent with the Convention. We decline to speculate further on the issue of whether the Warsaw Convention entirely preempts state law causes of action once its provisions are triggered by an "accident" within the meaning of Article 17.[33] The plaintiffs and Eastern concede

[33] It is evident that where the Convention applies it preempts inconsistent local law. Several courts have gone farther, however, and have concluded that the Convention is to be both the exclusive avenue of recovery and the exclusive remedy in the areas it governs. *See Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 737 F.2d 456, 459 (5th Cir. 1984) (court refused to award attorney's fees under Texas law and held that the Convention preempted plaintiff's negligence cause of action, stating that "[h]aving concluded that the Warsaw Convention creates the controlling cause of action, we further conclude that it preempts state law in the areas covered;" court implied that all state law causes of action would necessarily conflict with the Convention

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that the Convention's limitation on liability, the Montreal

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due to the interests of national and international uniformity and must therefore be preempted), *cert. denied*, 469 U.S. 1186 (1985); *Abramson v. Japan Airlines, Co.*, 739 F.2d 130, 134 (3d Cir. 1984) (court indicated that it would hold that the Convention is the exclusive basis for recovery), *cert. denied*, 470 U.S. 1050 (1985); *Benjamins v. British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978) ("the desirability of uniformity in international air law can best be recognized by holding that the Convention, otherwise universally applicable, is also the universal source of a right of action"), *cert. denied*, 439 U.S. 1114 (1979); *Stanford v. Kuwait Airlines Corp.*, 1989 U.S.Dist. LEXIS 614 (S.D.N.Y. Jan. 16, 1989) ("[t]he terms of the Warsaw Convention exclusively govern the rights and liabilities of the parties"); *Harpalani v. Air India, Inc.*, 622 F.Supp. 69, 73 (N.D.Ill. 1985) (Warsaw claim provides exclusive remedy for delays in air transportation, plaintiffs' non-Warsaw claims dismissed), *disapproved on other grounds Wolgel v. Mexicana Airlines*, 821 F.2d 442, 445 (7th Cir.), *cert. denied*, ____ U.S. ____, 108 S.Ct. 291 (1987); *Jahanger v. Purolator Sky Courier*, 615 F.Supp. 29, 32 (E.D.Pa. 1985) ("[w]here the Warsaw Convention applies, its limitations and theories of liability are exclusive"); *In re Air Crash Disaster at Warsaw, Poland on March 14, 1980*, 535 F.Supp. 833, 844-45 (E.D.N.Y. 1982) ("Warsaw Convention specifically controls and exclusively governs any and all claims for damages arising out of the death or injury of a passenger engaged in international air transportation, and plaintiffs cannot maintain a separate wrongful death action for damages under California law"), *aff'd* 705 F.2d 85 (2d Cir.), *cert. denied sub nom. Polskie Linie Lotnicze (LOT Polish Airlines) v. Robles*, 464 U.S. 845, 104 S.Ct. 147 (1983).

Some courts have taken the contrary view, holding that the Convention merely preempts inconsistent provisions of state law. *See Johnson v. American Airlines, Inc.*, 834 F.2d 721, 723 (9th Cir. 1987) ("[s]tate-law claims allowing damages for injuries to goods in international air transportation can only be maintained subject to the conditions and limits outlined in the Warsaw Convention"); *In re Mexico City Air Crash of October 31, 1979*, 708 F.2d 400, 414 n. 25 (9th Cir. 1983) (best explanation for the wording of Article 24(1) appears to be that the delegates did not intend that the cause of action created by the Convention to be exclusive); *In re Aircrash in Bali, Indonesia On April 22, 1974*, 684 F.2d 1301, 1311 n. 8 (9th Cir. 1982) ("the Convention has never been read to *limit* plaintiffs to a cause of action arising thereunder, but rather to limit the recovery in suits for injury") (emphasis in original),

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Agreement's waiver of the airlines' due care defense, and the other provisions of the Warsaw system apply in this case. The only aspect of their claim under state law which the plaintiffs argue differs from the Convention but is nevertheless consistent with its scheme of recovery is their claim for punitive damages, to which we now turn.

V. PUNITIVE DAMAGES

Plaintiffs in this case argue that Eastern's actions entitle them to punitive damages. Their argument that they are entitled to punitive damages is based both on the Warsaw Convention itself and on their state law cause of action for intentional infliction of emotional distress. We deal with these contentions in turn.

A. *Punitive Damages Under the Warsaw Convention*

The plaintiffs argue that Article 25 of the Warsaw Convention creates an independent cause of action which authorizes the recovery of punitive damages. Plaintiffs argue that Article 25 not only removes the limitation on compensatory damages contained in Article 22 as modified by the Montreal Agreement, but that Article 25 also creates

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later appeal, No. 86-6453, 1989 U.S. App. LEXIS 3725 (9th Cir. Mar. 27, 1989); *Tokio Marine & Fire Insurance Co. v. McDonnell Douglas Corp.*, 617 F.2d 936, 942 (2d Cir. 1980) (stating that Article 24 "indicates that [the drafters] did not intend that cause of action to be exclusive"); *In re Air Crash Disaster at Gander, Newfoundland*, 660 F.Supp. 1202, 1221 (W.D.Ky. 1987) (Warsaw not intended to displace state law); *Rhymes v. Arrow Air, Inc.*, 636 F.Supp. 737, 740 (S.D.Fla. 1986) (Article 24(1) "contemplates the application of the convention limitations to actions founded on a basis other than that of the convention"); *Perkin Elmer Computer Systems Div. v. Trans Mediterranean Airways, S.A.L.*, 107 F.R.D. 55, 61 (E.D.N.Y. 1985) ("state law cause of action may be available, even if a federal claim exists under the Convention").

The Supreme Court expressly has declined to address the question whether the Warsaw Convention provides the exclusive grounds for relief for an airline passenger involved in an accident. *Air France v. Saks*, 470 U.S. 392, ____, 105 S.Ct. 1338, 1347 (1985).

a cause of action itself which authorizes recovery of punitive damages. We reject this contention. The English translation[24] of Article 25 provides that:

> (1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be the equivalent to wilful misconduct.
>
> (2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

The structure of the Convention, the subsequent interpretation by the parties, and the unanimous case law persuade us that Article 25 operates only to remove the liability limitations of Article 22 in cases of "willful misconduct" by the air carrier, and was not intended to provide an independent right of action.

The provisions of the Convention which create liability for injuries to passengers, damage to baggage and cargo, and delay, Articles 17, 18, and 19, are entirely compensatory in tone and structure. *In re Air Crash Disaster at Gander, Newfoundland*, 684 F.Supp. 927, 931 (W.D.Ky. 1987). If a litigant is able to state a claim pursuant to one of these provisions, then Article 22, as modified by the Montreal Agreement, imposes a $75,000 limit on the carrier's liability which is created in Articles 17-19. In cases of willful misconduct, Article 25 strips the carrier of the liability

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[24] Plaintiffs have not suggested an alternative French legal meaning of Article 25, nor has our research uncovered any, with the exception of the controversy surrounding the precise meaning of "willful misconduct," which we discuss briefly in Part VI, *infra*.

limitation on compensatory damages. *See* Speiser and Krause § 11.36 at 761-62.

Subsequent conduct of the contracting parties supports this interpretation. This court has stated that "[m]inutes of the negotiations on the Hague Protocol, an amendment to the Convention, indicate that the delegates understood article 25 as referring only to article 22, which establishes monetary limits for recoveries under the Convention." *Highlands Insurance Co. v. Trinidad and Tobago (BWIA International) Airways Corp.*, 739 F.2d 536, 539 (11th Cir. 1984); *citing* 1 International Conference on Private Air Law, *Minutes* at 166, ICAO doc. 7686-LC/140 (1955). In fact, the amended Article 25 specifically stated that "[t]he limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result." Hague Protocol Art. XIII, *reprinted in* Kreindler, *Aviation Law Documents Supp.* at 959.[20]

Thus, the structure of the Convention and the subsequent actions of the contracting parties indicate that the phrase "provisions of this convention which exclude or limit his liability" used in Article 25 refers to the limitation on liability contained in Article 22, and does not create an independent cause of action contemplating punitive

[20]The amended Article 25 in Montreal Protocol No. 4 uses similar language, stating that "[i]n the carriage of passengers and baggage, *the limits of liability specified in Article 22 shall not apply* if it is proved that the damage resulted" from an intentional or reckless act on the part of the carrier or his employees. Montreal Protocol No. 4 Art. IX, *reprinted in* Kreindler, *Aviation Law Documents Supp.* at 997 (emphasis added). While the United States has not ratified the Hague or Montreal Protocols, we, like other courts, find their clarification of the operation of Article 25 to be instructive. *Highlands*, 739 F.2d at 539 n.10. *See Saks*, 470 U.S. at ____, 105 S.Ct. at 1344 (Court relied on subsequent actions by contracting parties which have not been ratified by the Senate in interpreting Article 17 of the Convention).

damages. *See* H. Drion, *Limitation of Liabilities in International Air Law* 70, 260-61 (1954) (Article 25 not intended to refer to any source of law outside of the Convention).

The cases which have addressed this issue uniformly have concluded that Article 25 does not create an independent right of action, but rather serves only to remove the limitation on liability contained in Article 22 of the Convention. *Highlands*, 739 F.2d at 539. *See Stone v. Mexicana Airlines, Inc.*, 610 F.2d 699, 700 (10th Cir. 1979) (allegations of willful misconduct do not avoid statute of limitations contained in Article 29(1)); *In re Air Crash Disaster at Gander, Newfoundland*, 684 F.Supp. 927, 932 (W.D.Ky. 1987) (Article 25 an exception to limits on compensatory damages as authorized in Article 17, not an independent basis for awarding punitive damages); *Harpalani v. Air India, Inc.*, 634 F.Supp. 797, 799 (N.D.Ill. 1986) ("Article 25 is most reasonably interpreted as an exception to the Convention's limitations on the recovery of compensatory damages, not as authority for a form of damages not permitted elsewhere in the Convention"), *disapproved on other grounds Wolgel v. Mexicana Airlines*, 821 F.2d 442, 445 (7th Cir.), *cert. denied*, ____ U.S. ____, 108 S.Ct. 291 (1987); *Magnus Electronics, Inc. v. Royal Bank of Canada*, 611 F.Supp. 436, 443 (N.D.Ill. 1985) ("*All* the cases teach the 'exclude or limit his liability' language was aimed at the familiar provisions of Article 22") (emphasis in original).[20]

[20]The cases that the passengers cite for the proposition that Article 25 creates an independent basis for liability simply do not so hold. In *Butler v. Aeromexico*, 774 F.2d 429 (11th Cir. 1985), the court upheld a damage award in excess of the $75,000 Warsaw Convention limitation based on Article 25. The court in *Butler* framed the issue as "whether the conduct of defendant's crew amounted to 'wilful misconduct' within the meaning of Article 25 of the Warsaw Convention *so as to render inapplicable the convention's $75,000.00 limitation of liability provision (Article 22)*." 774

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Highlands' analysis of Article 25 was in the context of the applicability of the notice provisions of Article 26 in cases of willful misconduct. In *Highlands*, a shipper of goods failed to give proper notice to the airline pursuant to Article 26 of the Convention that his goods had been damaged during shipment. The shipper argued, *inter alia*, that the airline's willful misconduct served to remove the notice requirements. The court squarely rejected this argument, stating that "article 25 does not deprive the carrier of the article 26 notice provisions." 739 F.2d at 539. In light of the structure of the Convention, subsequent interpretations of the parties, and unanimous case law, we readily extend the principle articulated in *Highlands* and hold that Article 25 of the Warsaw Convention does not create an independent cause of action for willful misconduct which would entitle plaintiffs to punitive damages."

B. *Punitive Damages Under State Law*

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F.2d at 430 (emphasis added). Nowhere in *In re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301 (9th Cir. 1982), *later appeal*, No. 86-6453, 1989 U.S. App. LEXIS 3725 (9th Cir. Mar. 27, 1989), does the court suggest that Article 25 offers an independent source of a right of action. In fact, when discussing the Convention in general terms, the court states that Article 25 "excepts from the limit on the carrier's liability, injury or death caused by the carrier's 'willful misconduct.'" 684 F.2d at 1305. Finally, in affirming the court below, the court in *Compania de Aviacion Faucett S.A. v. Mulford*, 386 So. 2d 300, 301 (Fla. 3d D.C.A. 1980), expressly stated that "the lower court found that the airline had been guilty of 'wilful misconduct' under Article 25(1) so as to render inapplicable the provisions of Article 22(2) of the Warsaw Convention." It is difficult to construe this language as suggesting that Article 25 operates as a separate ground for recovery.

"Plaintiffs do not argue that the cause of action for personal injuries created by Article 17 authorizes recovery of punitive damages. We agree that Article 17 contemplates only compensatory damages, which we see below has considerable significance in our rejection of plaintiffs' argument that the Convention's "silence" on the issue of punitive damages allows them to recover punitive damages under state law.

Plaintiffs argue that recovery of punitive damages under state law is not inconsistent with the Warsaw Convention. They contend that the Convention's silence on the question of punitive damages means that recovery of punitive damages under Florida law is allowed.[13] The unofficial English translation[14] of Article 24 of the Convention provides that

> (1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> (2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

Article 24 thus requires this court to determine whether an award of punitive damages is contemplated by the "conditions and limits set out in this convention." In other words, the issue is whether an award of punitive damages would be in conflict with the scheme of liability provided for in the Warsaw Convention. We conclude that there would be a conflict, and therefore hold that plaintiffs' claim for

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[13]Because the district court held that plaintiffs could not state a cause of action under the Warsaw Convention, 629 F.Supp. at 312-14, it did not address the question of whether awarding punitive damages under state law would conflict with the Convention.

[14]While the French legal meaning of the Warsaw Convention controls its interpretation, see Part III, *supra*, we need not set out the original French text of Article 24 here because the precise legal meaning of the terms has not been questioned. *See Denby v. Seaboard World Airlines, Inc.*, 737 F.2d 172, 177 (2d Cir. 1984) (Friendly, J.) ("As a practical matter, however, American lawyers and courts have initially addressed themselves to the English text and have consulted the French text only when there is a substantial contention that it has a different meaning.").

punitive damages under Florida law is preempted by the Warsaw Convention.

Before we address the question of whether an award of punitive damages under state law would conflict with the Convention, we must first determine whether the Convention itself contemplates recovery for punitive damages.[40] We have already rejected plaintiffs' argument that Article 25 creates a separate cause of action for "willful misconduct" that contemplates the recovery of punitive damages. For the reasons indicated below we also conclude

[40]Apart from the liability limitations contained in Article 22 of the Convention, the issue of the computation of damages generally is governed by local law, except, of course, where such law conflicts with the Convention. *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1002 (9th Cir. 1987); *In re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1315 (9th Cir. 1982), *later appeal*, No. 86-6453, 1989 U.S. App. LEXIS 3725 (9th Cir. Mar. 27, 1989); *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851, 858 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965); *Cohen v. Varig Airlines*, 62 A.D.2d 324, 405 N.Y.S.2d 44, 49 (1978). *See* Kreindler, 1 *Aviation Accident Law* § 11.08 at 11-94. As the discussion in the text indicates, the issue in this case — whether the state law claim for punitive damages is inconsistent with the Convention — is not merely a matter of computation of damages; rather we hold that the state law claim for punitive damages is inconsistent with the compensation scheme established by the Convention.

Courts sometimes have had difficulty determining exactly when a local law damage provision conflicts with the Convention. *See, e.g. O'Rourke v. Eastern Air Lines, Inc.*, 553 F.Supp. 226, 228 (E.D.N.Y. 1982) (determination whether prejudgment interest available in action arising out of plane crash "must be determined solely with respect to the Warsaw Convention/Montreal Agreement. All local law to the contrary. . . must therefore be preempted"), *aff'd in relevant part* 730 F.2d 842, 851-53 (2d Cir. 1984) (court refused to allow prejudgment interest in a case governed by the Convention); *Deere & Co. v. Deutsche Lufthansa Aktiengesellschaft*, 855 F.2d 385, 391-92 (7th Cir. 1988) (same). *But see Domangue v. Eastern Air Lines, Inc.*, 722 F.2d 256 (5th Cir. 1984) (prejudgment interest, subject to damage limits, allowed in a Warsaw case because it furthers the purpose of speeding settlement and recovery); *Eli Lilly Argentina, S.A. v. Aerolineas Argentinas*, 133 Misc.2d 858, 508 N.Y.S.2d 865 (N.Y.Civ. 1986) (same).

that Article 17 does not authorize recovery of punitive damages. In fact, plaintiffs do not argue that it does; rather, they contend that they have both a state law cause of action for intentional infliction of emotional distress (which permits recovery of punitive damages in appropriate cases) and a Warsaw Convention cause of action (which is silent on punitive damages). Because the Convention is silent on the issue, they contend that an award of punitive damages would be consistent with the provisions of the Convention.

It is true that the text of the Convention does not explicitly address the issue of punitive damages. However, we do not think plaintiffs can take much comfort in this "silence." The basis for recovery for passengers who suffer death or personal injury in international air travel is Article 17 of the Convention. Our study of the text and structure of the Convention, and the concurrent and subsequent legislative history persuade us that Article 17 is entirely compensatory in nature.

As we have previously noted, Article 17 of the Convention provides that "Le transporteur est responsable du *dommage survenu* en case de mort, de blessure ou de toute autre lésion corporelle. . . " (emphasis added). We have already concluded that *lésion corporelle* encompasses the concept of mental or emotional injury. Part III, *supra*. Plaintiffs' contention that the Convention authorizes the recovery of punitive damages requires us to analyze the meaning of *dommage survenu* ("damage sustained") in order to determine whether that phrase allows punitive damages.

Plaintiffs have pointed to no authority suggesting that the French legal meaning of Article 17 permits recovery of punitive damages, and we have found no such authority. *See Saks*, 470 U.S. at ____, 105 S.Ct. at 1342 (French legal meaning controls terms of Convention). In fact, what we have found indicates otherwise. In civil law systems, an action under the Warsaw Convention sounds in contract. *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 331

(5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968); Nicolas Mateesco Matte, *Treatise on Air-Aeronautical Law* 403-04 (1981). The parties may agree to a penalty clause, but punitive damages generally are not available in contract actions. *See* Marcel Plainol and George Ripert, 2 *Treatise on the Civil Law* No. 247 at 149 (11th ed. 1959) (Louisiana State Law Institute translation) ("[t]he indemnity should represent exactly as possible the real damage suffered by the creditor"); Barry Nicholas, *French Law of Contract* 226 (1982) ("The overriding principle [in assessing damages] is that damages should compensate the creditor for the loss suffered. The expression of disapproval of the debtor's conduct has no place in the assessment of damages").

The plaintiffs in *In re Air Crash Disaster at Gander, Newfoundland*, 684 F.Supp. 927 (W.D.Ky. 1987), argued that the word "*survenu*" in Article 17 was more appropriately translated as "happened" or "arisen," not as "sustained." The court declined to accept this interpretation, noting that the plaintiffs cited no authority for their assertion. 684 F.Supp. at 931. The term *dommage survenu* or "damage sustained" is entirely compensatory in tone. *Gander*, 684 F.Supp. at 931. Punitive damages are intended to penalize the wrongdoer in order to benefit society, and as such are not "sustained" by the victim. *See* Morris, Punitive Damages in Tort Cases, 44 Harv.L.Rev. 1173, 1183 (1931).

We also find significance in the fact that the only provision of the Convention which addresses remedies for intentional or reckless acts by the carrier, acts usually associated with the recovery of punitive damages in the United States,[11] did not address the issue of punitive damages at all. Rather, as we have already demonstrated, Article 25 provided only that the strict limit on liability for

[11] *See Dorsey v. Honda Motor Co.*, 655 F.2d 650, 657-58 (5th Cir. Unit B 1981), *cert. denied*, 459 U.S. 880 (1982), *later proceeding* 730 F.2d 675 (11th Cir. 1984); Prosser § 2 at 9-10.

compensatory damages was to be lifted in cases of intentional or willful acts.

Nowhere in the Minutes of the Convention is there any mention of deterring misconduct by imposing punitive damages on derelict air carriers. *See generally Minutes*. Thus, the concurrent legislative history supports the interpretation that the Convention contemplates recovery of only compensatory damages.

Unlike *lésion corporelle*, subsequent interpretations of the parties have cast no doubt as to the accuracy of the translation of *dommage survenu* as "damage sustained." The official English translation adopted at the Hague in 1955, the United States State Department translation which accompanied the Convention when it was ratified by the Senate, and the Guatemala Protocol all use the "damage sustained" language. *See* 49 U.S.C. note following § 1502 (American translation), Kreindler, *Aviation Law Documents Supp.* at 955, 975 (official English translation, Guatemala Protocol).

We are thus convinced that the plaintiffs' claim for punitive damages finds no support in the Convention, either in those provisions creating liability (Articles 17-19) or in the provision which allows full compensation in cases of willful misconduct by the air carrier (Article 25). Plaintiffs contend, however, that their state law claim for punitive damages does not conflict with the Convention's "silence" on punitive damages. We disagree, and conclude that recovery of punitive damages under state law would conflict with the scheme of recovery established by the Convention.

We note at the outset the significant difference between punitive damages and compensatory damages. Punitive damages are not intended to compensate victims, but rather are private fines, awarded in addition to what is necessary to compensate victims, levied by civil juries to punish a defendant for his conduct and to deter others from engaging

in similar conduct in the future. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S.Ct. 2748, 2759 (1981); *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 48, 99 S.Ct. 2121, 2125-26 (1979); Prosser § 2 at 9-15.[42] As our discussion has indicated, the Warsaw Convention contemplated recovery of only compensatory damages. We believe that the intent of the Convention to provide compensatory damages suggests that it would be inconsistent to allow punitive damages which serve a purpose very different from compensating victims.

This conclusion is supported by the purposes and goals of the Convention to limit strictly the liability of the airlines and to provide a uniform and comprehensive scheme of liability. The Convention was intended to place strict limits on air carrier liability for accidents, as well as to ensure at least a measure of compensation for accident victims. *See* Lowenfeld and Mendelsohn, 80 Harv.L.Rev. at 498-501; Part III, *supra*. Holding that the punitive damages are unavailable in an action governed by the Warsaw Convention furthers the goal of certainty of liability. *See Reed v. Wiser*, 555 F.2d 1079, 1089 (2d Cir.) ("It is beyond dispute that the purpose of the liability limitation prescribed by Article 22 was to fix at a definite level *the cost to airlines* of damages sustained by their passengers and of insurance to cover such damages."), *cert. denied*, 434 U.S. 922 (1977). Allowing punitive damages in Warsaw Convention cases would undermine this strict limitation of liability, which was the central feature of the Warsaw

[42] While mental injuries (*dommage moral* in the civil law) are intangible in nature, allowing recovery for them is intended to be compensatory, and is in no way meant to penalize the wrongdoer. *See McGee v. Yazoo & M.V.R. Co.*, 206 La. 121, 19 So.2d 21 (1944) ("damages for mental anguish or suffering are actual rather than exemplary or punitary"); Barry Nicholas, *French Law of Contract* 220-23 (1982); Marcel Plainol and George Ripert, 2 *Treatise on the Civil Law* Nos. 867-868A at 470-73 (11th ed. 1959) (Louisiana State Law Institute translation).

system. *See Trans World Airways, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 256, 104 S.Ct. 1776, 1784 (1984).

The recovery of punitive damages would also be inconsistent with the goal of the Convention to provide a comprehensive and uniform scheme governing the liability of the airlines in the areas covered by the Convention. The text of the Convention points out the necessity of uniformity and the desire for a comprehensive set of rules in those areas where the signatories intended the Convention to apply. The preamble of the Convention declares the intent of the signatory nations as "regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier." Article 1(1) of the Convention provides that "[t]his convention *shall* apply to *all* international transportation of persons, baggage, or goods performed by aircraft for hire" (emphasis added). Uniformity of rules governing international air operations is a primary goal of the Convention. *See Reed v. Wiser*, 555 F.2d 1079, 1090 (2d Cir.) ("fundamental purpose of the signatories to the Warsaw Convention, which is entitled to great weight in interpreting that pact, was their desire to establish a uniform body of world-wide liability rules to govern international aviation, which would supersede with respect to international flights the scores of differing domestic laws") (footnote omitted), *cert. denied*, 434 U.S. 922 (1977); *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 337-38 (5th Cir. 1967) ("The Court has an obligation to keep interpretation as uniform as possible."), *cert. denied*, 392 U.S. 905 (1968). This uniformity interest applies not only internationally, but also within the United States as well. *Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 737 F.2d 456, 459 (5th Cir. 1984), *cert. denied*, 469 U.S. 1186 (1985). It would contravene the Convention's goal of uniformity should there be recovery for punitive damages in some forums and not in others.

We have found no case in which a court awarded punitive damages in a case governed by the Convention, and we decline to depart from this uniformity. In *Butler v. Aeromexico*, 774 F.2d 429 (11th Cir. 1985), this court held that the Convention preempted Alabama law regarding damages for wrongful death. In that case, the court stated that Alabama law, which allows recovery for only punitive damages in a wrongful death case, "conflict[ed] with the tenor of the Warsaw Convention, *which contemplates compensation for victims of air disasters*." 774 F.2d at 431 (emphasis added). While the court in *Butler* did not squarely hold that only compensatory damages are available under the Warsaw system, the decision clearly points to that result, which we make explicit today.

The only decisions which have explicitly confronted the issue also support our conclusion. After undertaking an analysis similar to the one above, the court held in *In re Aircrash Disaster at Gander, Newfoundland*, 684 F.Supp. 927 (W.D.Ky. 1987), that "the Warsaw Convention by its terms and history allows *compensatory* damages claims against carriers arising under state law but excludes *punitive* damages claims" in wrongful death actions under Article 17. 684 F.Supp. at 933 (emphasis in original). The court in *Gander* also held that the Convention preempted plaintiffs' state law claims for punitive damages. *Id.; see Harpalani v. Air-India, Inc.*, 634 F.Supp. 797 (N.D.Ill. 1986) (court struck plaintiffs' claim for punitive damages under Article 19 of the Convention), *disapproved on other grounds Wolgel v. Mexicana Airlines*, 821 F.2d 442, 445 (7th Cir.), *cert. denied*, ____ U.S. ____, 108 S.Ct. 291 (1987).[43]

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[43]Plaintiffs cite *Hill v. United Airlines*, 550 F.Supp. 1048 (D.Kan. 1982), to support their contention that the Convention contemplates recovery of punitive damages. In *Hill*, the court claimed damages for intentional misrepresentation arising out of international air transportation. The court initially found that "[l]iability, if any, is predicated on defendant's commission of the tort of misrepresentation, a

(Footnote continued on next page)

We conclude that the Warsaw Convention itself provides for recovery of compensatory damages only, and that it would be inconsistent with the Convention's scheme of recovery to allow plaintiffs to recover punitive damages on their state law cause of action. Therefore, we hold that the Convention preempts plaintiffs' claim under Florida law for punitive damages.

VI. WILLFUL MISCONDUCT ON REMAND

While it is clear that Article 25 does not provide an independent basis for holding Eastern liable for punitive damages, it is possible that the facts alleged here constitute willful misconduct and serve to remove the liability limitations on compensatory damages of Article 22 and the Montreal Agreement."

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circumstance completely outside of the Warsaw Convention." 550 F.Supp. at 1054. The court went on, however, to state that "while the Warsaw Convention is basically the controlling law in this case, plaintiffs have properly invoked the provisions of Article 25(1), which make an exception to defendant's limited liability and might entitle plaintiffs to recover actual and punitive damages. . . . " 550 F.Supp. at 1056. It is not clear whether the court in *Hill* held that punitive damages are recoverable in an action governed by the Convention, since the court appeared to hold that the Convention was inapplicable to the facts of that case. In any event, to the extent that *Hill* authorizes recovery of punitive damages under the Warsaw Convention, we decline to accept its holding. *See In re Air Crash Disaster at Gander, Newfoundland*, 684 F.Supp. 927, 933 (W.D.Ky. 1987).

"The precise formulation of Article 25 has been a subject of international scholarly and judicial dispute. The French version of Article 25(1) read as follows:

> (1) Le transporteur n'aura pas le droit de se prevaloir des dispositions de la presente Convention qui excluent ou limitent sa responsabilite, si le dommage provient de son dol ou d'une faute qui, d'apres la loi du tribunal saisi, est considere comme equivalente au dol.

(Footnote continued on next page)

This question must first be addressed by the trial court on remand. Willful misconduct is a question of fact and should be addressed in the first instance by the district court. *Butler v. Aeromexico*, 774 F.2d 429, 432 (11th Cir. 1985); *Abramson v. Japan Airlines Co., Ltd.*, 739 F.2d 130, 135 (3d Cir. 1984), *cert. denied*, 470 U.S. 1059 (1985). Determining whether willful misconduct occurred in a given case is an extremely fact-sensitive inquiry. The plaintiff has the burden of proving willful misconduct by the air carrier. *Berguido v. Eastern Air Lines, Inc.*, 317 F.2d 628, 629 (3d Cir.), *cert. denied*, 375 U.S. 895 (1963); *Grey v. American Airlines, Inc.*, 227 F.2d 282, 285 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956); *Domangue v. Eastern Air Lines, Inc.*, 531 F.Supp. 334, 341 n. 51 (E.D.La. 1981); Speiser and Krause § 11.37 at 772.

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The term *"dol"* has no precise common law analogue. It does seem evident, however, that the term "willful misconduct" expressed the intent of the drafters of the Convention at the time, any doubts about the precise terminology notwithstanding. *See Minutes* at 59 (Sir Alfred Dennis, leader of the British delegation, stated that "[w]e have at home the expression 'willful misconduct'; I believe that it covers all that which you mean; it covers not only deliberate acts but also careless acts done without regard for the consequences."); Miller at 80 ("[i]n an English court, air carriers would be subjected to unlimited liability in cases of wilful misconduct, and, in civil law courts, there would be unlimited liability in cases of *dol*"). American courts have relied upon the term "willful misconduct" as the correct manifestation of the drafters' intent. *See, e.g., Butler v. Aeromexico*, 774 F.2d 429, 430 (11th Cir. 1985); *Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines Holland v. Tuller*, 292 F.2d 775 (D.C.Cir.), *cert. denied*, 368 U.S. 921 (1961); *Pekelis v. Transcontinental & Western Air, Inc.*, 187 F.2d 122, 125 n. 2 (2d Cir.), *cert. denied*, 341 U.S. 951 (1951); *American Airlines, Inc. v. Ulen*, 186 F.2d 529, 533 (D.C.Cir. 1949) (Minutes of the Convention "show little more than that the delegates were at the time in disagreement as to what terms would express their intent when translated into various languages").

VII. AMENDMENT OF COMPLAINTS

Plaintiffs in two of the twenty-five cases before us on appeal, Sandy Dix and Gary Dix (case number 84-0030) and Salim Khoury and Deborah Khoury (case number 84-1703), sought leave to amend their complaints to allege physical injury resulting from the events on Flight 855. The district court denied their motions to amend. We hold that the trial court abused its discretion in refusing to allow these plaintiffs to amend their complaints to allege physical injury.

In denying these plaintiffs' motions to amend, the district court stated that "the question of whether any of the Plaintiffs have sustained physical injuries has been an issue in this case for over a year." Order Denying Motion for Reconsideration 4 (April 28, 1986) (R 3-125:4). Although they did not seek to formally amend their complaints until after the district court's dismissal of their initial complaints, the Dix and Khoury plaintiffs had offered to amend their complaints as early as June, 1985, in a memorandum filed in opposition to Eastern's motion to dismiss. The mere passage of time, without anything more, is an insufficient reason to deny leave to amend. *Dussouy v. Gulf Coast Investment Corp.*, 660 F.2d 594, 597-98 (5th Cir. 1981). *See Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227 (1962). Here, the plaintiff's offer to amend was made in response to the defendant's initial challenge to the sufficiency of the complaint. Any delays thereafter were due to scheduling delays, not to any dilatory actions by the plaintiffs who sought leave to amend. Eastern did not allege any prejudice due to this alleged delay; in fact, it apparently consented to amending the complaints to show physical injury.[45] Because

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[45] At a January 21, 1986 hearing on the motions to dismiss, counsel for Eastern stated that "[t]here are some cases which I think haven't been pled, and there are cases which certainly you could give them the opportunity to amend a subsequent physical sequellae." SR 1:26. The trial

(Footnote continued on next page)

we have held that physical injury is not necessary to state a claim under the Warsaw Convention, a lack of physical injuries is not fatal to these plaintiffs' complaints. Nevertheless, a showing of physical injury may affect the plaintiffs' recoverable damages, and we therefore reverse the district court's denial of their motion to amend.

For these reasons, we hold that the trial court abused its discretion in refusing to allow the Dix and Khoury plaintiffs leave to amend their complaints to allege physical injury.

VIII. CONCLUSION

In conclusion, we currently are bound by the Florida decision that the plaintiff passengers on Eastern Flight 855 have stated a cause of action for intentional infliction of emotional distress under Florida law. Final resolution of that issue must await the Supreme Court of Florida's decision on the issue. We hold that the plaintiffs' allegations of emotional injury are sufficient to state a cause of action under the Warsaw Convention. We also hold that this Warsaw Convention cause of action preempts those aspects of the state law cause of action which conflict with the Convention, including plaintiffs' claim for punitive damages. In addition, plaintiffs allegations of willful misconduct under Article 25 of the Warsaw Convention serve not as an independent basis for relief, but only to remove the liability limitations of the Convention if willful misconduct can be demonstrated. Whether Eastern's actions in this case constituted willful misconduct is for the district court to determine on remand. Finally, we reverse the district court's denial of leave to amend the Dix and Khoury complaints.

REVERSED and REMANDED.

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court construed this concession to amendment "to extend only to those complaints wherein there appeared an allegation of some type of physical injury." R 3-125:4.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MDL 575 ALL CASES (DAVIS)

IN RE: EASTERN AIRLINES, INC., ENGINE FAILURE, MIAMI INTERNATIONAL AIRPORT ON MAY 5, 1983.

ORDER DISMISSING COMPLAINTS
WITH PREJUDICE*
(February 3, 1986)

THIS MATTER is before the Court on Defendant EASTERN AIRLINES, INC.'s, Motion for Judgment on the Pleadings. On January 21, 1986, a hearing was held on Defendant's Motion. After review of the memoranda submitted in support of and in opposition to this motion, and upon consideration of the arguments presented at the hearing on this motion, it is

ORDERED AND ADJUDGED that the Complaints filed in this case are DISMISSED with prejudice. The parties are directed to the "DISPOSITION OF THE COMPLAINTS" section, captioned below, for the precise disposition of each Complaint.

DISCUSSION

This action arose on or about May 5, 1983, out of Eastern Airline's Flight No. 855, bound for Nassau, Bahamas, from Miami International Airport, Miami, Florida. Shortly after take-off, one of the aircraft's engines failed, and the plane turned around for return and landing in Miami. After turning around, the aircraft's other two engines failed.

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*All MDL 575 cases are hereby dismissed with prejudice, with the exception of Case NO. 84-1259-CIV-GONZALEZ. *See* "Disposition of Complaints" Section, *infra* at 15-21.

The crew and passengers prepared for ditching of the aircraft as it lost altitude due to the engine failure. After a period of flight without any engines, the crew was able to restart one engine, under whose sole power the plane landed at Miami International Airport.

Each of the Complaints filed in this case contains four basic counts: one in contract, two in tort, and one under the Warsaw Convention. Defendant EASTERN AIRLINES, INC., has filed a Motion for Judgment on the Pleadings, asserting, *inter alia*, that nowhere in the Complaints are there allegations that Plaintiffs sustained physical injury, bodily injury, impact and/or direct physical contact during or resulting from the subject flight. Defendant argues the Complaints fail to state claims upon which relief can be granted.

This Order is directed to the sufficiency of the Plaintiffs' allegations under state law, i.e., under Breach of Contract (Count I), Negligence (Count II), and entire Want of Care (Count III) theories,[1] and under federal law, pursuant to the Warsaw Convention (Count IV).

COUNT I—EASTERN'S BREACH OF CONTRACT TO USE THE HIGHEST DEGREE OF CARE

Plaintiffs contend that the state claim aspects of this case are governed by *Kirksey v. Jernigan*, 45 So.2d 188 (Fla. 1950). The Court finds that *Kirksey* does not support

[1]Although the Plaintiffs claim it "is hardly axiomatic that Florida law will be applicable," *see* Plaintiffs' Memorandum Opposing Defendant's Motion for Judgment on the Pleadings at 2 n.3, both Plaintiffs and Defendant argued the sufficiency of the state law claims as governed by the law of Florida. Under both conflicts of law principles and the *Erie* doctrine, this Court concludes that the substantive law of Florida governs the state law claims. *See Klaxon v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 61 S.Ct. 1020 (1941); *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938); *Griffith v. United Airlines*, 416 Pa. 1, 203 A.2d 796 (1964). *Bishop v. Florida Specialty Paint Co*, 389 So.2d 999 (Fla. 1980).

Plaintiffs' claims for breach of contract. In *Kirksey*, the Florida Supreme Court reaffirmed the long-standing Florida rule that "there can be no recovery for mental pain and anguish unconnected with physical injury in an action arising out of the negligent breach of a contract whereby simple negligence is involved." *Id.* at 189. *Kirksey* has been interpreted to mean that there can be no recovery for mental distress caused by a breach of contract in the absence of an independent willful tort. *Crenshaw v. Sarasota County Public Hospital Board*, 10 F.L.W. 880, 881 (Fla. 2d DCA April 3, 1985); *Gellert v. Eastern Airlines, Inc.*, 370 So.2d 802 (Fla. 3d DCA 1979), *cert. denied*, 381 So. 29 766 (Fla. 1980); *Ford v. Royal's, Inc.*, 537 F.Supp. 1173, 1175 (S.D.Fla. 1982).

Consequently, in the instant suit, the sufficiency of Plaintiffs' allegations under Counts II and III, the tort counts, is determinative of the viability of Plaintiffs' cause of action in contract. Because this Court concludes, as discussed below, that the Complaints fail to adequately allege an independent willful tort, there can be no recovery under Count I for mental anguish arising out of a breach of contract.

COUNT II—EASTERN'S NEGLIGENCE

Count II seeks recovery for simple negligence. Under Florida law "there is no cause of action for psychological trauma alone when resulting from simple negligence." *Brown v. Cadillac Motor Car Division*, 10 F.L.W. 156 (Fla. March 8, 1985). *See also Champion v. Gray*, 10 F.L.W. 164 (Fla. March 8, 1985). Recovery for emotional distress caused by simple negligence, as alleged in Count II, is therefore precluded absent allegations of discernible and demonstrable physical injury. *Brown*, 10 F.L.W. at 156 (holding that, in cases where a person suffers no physical injuries in an accident the "psychological trauma must cause a demonstrable physical injury such as death, paralysis,

muscular impairment, or similar objectively discernible physical impairment before a cause of action may exist").

Plaintiffs argue that *Brown* and *Champion* are not controlling because this suit involves emotional distress caused by fear for one's own safety, and not distress caused to a bystander out of fear for another's safety. While it is true that "personal" and "bystander" distress constitute two distinct emotional circumstances, *see Champion v. Gray*, 10 F.L.W. 164, 165 (Fla. March 8, 1985), recognition of this distinction offers no relief to the Plaintiffs in the case *sub judice*.

In *Brown* and *Champion* the impact rule was modified to allow recovery for damages flowing from discernible physical injury caused by psychic trauma resulting from negligent injury to another. If, as Plaintiffs argue, these "bystander" cases leave undisturbed prior Florida law regarding recovery for emotional distress caused by fear for one's own safety, then Plaintiffs' claim for negligence must fail, for the "impact rule" would bar recovery. Alternatively, if this Court were to fashion a "new" rule, regarding recovery for mental distress caused by fear for one's own safety, as opposed to fear for another's safety, it would nonetheless decline to allow recovery for psychic trauma alone. *Cf. Champion*, 10 F.L.W. at 165 ("the public policy of this state is to compensate for physical injuries . . . we are willing to modify the impact rule, but are unwilling to expand it to purely subjective and speculative damages for psychic trauma").

Absent allegations of impact and/or direct physical contact resulting from Defendant's alleged negligence, this Court concludes that there can be no recovery for emotional distress caused by simple negligence, unless Plaintiffs can

establish discernible *physical* consequences resulting from the distress.[3]

COUNT III—EASTERN'S ENTIRE WANT OF CARE

In *Kirksey v. Jernigan*, 45 So.2d 188, 189 (Fla. 1950), the Florida Supreme Court stated:

> We do not feel constrained to extend [the rule barring recovery for mental pain and anguish unconnected with physical injury] to cases founded purely in tort, where the wrongful act is such as to reasonably imply malice, or where, from the entire want of care of attention to duty, or great indifference to the persons, property, or rights of others, such malice will be imputed as would justify the assessment of exemplary or punitive damages.

In the previously-cited case of *Brown v. Cadillac Motor Car Division*, 10 F.L.W. 164 (Fla. March 8, 1985), a negligence case, the Florida Supreme Court noted that its "ruling does not disturb any prior decisions allowing [damages for psychological trauma] in intentional tort cases." *Brown*, 10 F.L.W. at 164 n.*. Plaintiffs, therefore, argue that Count III, entitled "Entire Want of Care", states a cause of action under *Kirksey*. Defendant counters that *Kirksey* did not establish an independent cause of action for "entire want of care." Upon review of the relevant case law, this Court concludes, as Defendant contends, that *Kirksey* did not establish an independent cause of action in tort.

When *Kirksey* was decided, Florida had not yet recognized an independent cause of action for intentional infliction of emotional distress. Generally, recovery for

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[3]This Court concludes, consistent with the Florida Supreme Court's ruling in *Kirksey*, that simple negligence, even if it did exist, could not serve as the basis for recovery under Count I for emotional distress arising out of a breach of contract. *Kirksey v. Jernigan*, 45 So.2d 188, 189 (Fla. 1950). *See also Crenshaw v. Sarasota County Public Hospital Board*, 10 F.L.W. 880 (Fla. 2d DCA April 13, 1985).

emotional distress alone was barred. In *Kirksey*, however, the Florida Supreme Court recognized for the first time, not a new tort, but, that damages for emotional distress alone could be recovered if the defendant was guilty of another recognized intentional tort.[3] Later Florida Supreme Court opinions support this interpretation of *Kirksey*. *See e.g.*, *Slocum v. Food Fair Stores of Florida*, 100 So.2d 396 (Fla. 1958). In *Slocum*, the Supreme Court of Florida stated that the *Kirksey* decision "would apparently allow recovery for mental suffering, even absent physical consequences, inflicted in the course of *other* intentional or malicious torts. . . ." *Id.* at 395 (emphasis added).

This Court concludes that Count III can withstand a motion to dismiss for failure to state a cause of action only if facts are alleged which, assuming their truth, would put the Defendant on notice of an independently recognized intentional tort.

In *Metropolitan Life Insurance Company v. McCarson*, 10 F.L.W. 154 (Fla. March 7, 1985), the Florida Supreme Court recognized for the first time the tort of intentional infliction of emotional distress. Section 46 of the Restatement (Second) of Torts (1965) has been adopted in Florida as the appropriate definition of the tort. *Id.* Section 46 defines the tort of intentional infliction of mental distress as follows:

> § 46. Outrageous Conduct Causing Severe Emotional Distress
>
> . . . One who by extreme and outrageous conduct intentionaly or recklesaly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

[3]In *Kirksey*, the court permitted damages for mental pain and anguish, finding that the defendant was guilty of the separate tortious act of "tortious interference with rights involving dead human bodies. . . ." *Kirksey v. Jernigan*, 45 So.2d at 189.

Restatement (Second) of Torts, § 46 (1965). To state a cause of action under this definition, it is necessary that Plaintiffs allege conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency." *Metropolitan Life Insurance Co.*, 10 F.L.W. at 155.

"It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery." Restatement (Second) of Torts, § 46, comment h (1965). In the instant suit, Count III realleges the previous counts for breach of contract and negligence and alleges that EASTERN acted with an "entire want of care" or that the subject incident was caused by the "outrageous and willful misconduct" of EASTERN. The facts alleged in support of these claims include EASTERN's alleged failure to properly inspect, maintain, and operate its aircraft. More particularly, it is alleged that EASTERN's records reveal at least one dozen prior instances of engine failure due to missing "O-rings", yet, EASTERN failed to cure the problem.

This last allegation is, perhaps, the Plaintiffs' strongest attempt to allege some type of scienter on the part of EASTERN. The Court finds, however, that the allegations contained in the Complaints, assuming their truth, do not support the contention that EASTERN AIRLINES acted "intentionally or recklesaly" as requried to state a cause of action for intentional infliction of emotional distress. There are no facts alleged to support the claim that EASTERN is guilty of "outrageous and willful misconduct."

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has

> been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Restatement (Second) of Torts, § 46, Comment d (1965) (*cited in Metropolitan Life Insurance Company v. McCarson*, 10 F.L.W. 154, 155 (Fla. March 7, 1985).

This Court concludes that Plaintiffs have failed to state a cause of action under Count III, the intentional tort count.

COUNT IV—WARSAW CLAIM

Article 17 of the Warsaw Convention,[4] which establishes the liability of international air carriers for harm to passengers, provides as follows:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

In *Air France v. Saks*, ____ U.S. ____, 105 S.Ct. 1338 (1985), the Supreme Court held that liability under Article 17 of the Warsaw Convention arises "only if a passenger's

[4]Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1979, 49 Stat. 3000, T.S. No. 876 (1934), note following 49 U.S.C. App. §1502.

injury is caused by an unexpected or unusual event or happening that is external to the passenger." 105 S.Ct. at 1345.[5]

The Defendant does not contend that the engine failure and subsequent preparations for ditching of the aircraft did not constitute an accident within the meaning of Article 17. Clearly, those events were not the normal and expected operations of the aircraft. *See, e.g. Weintraub v. Capital International Airways, Inc.*, 16 CCH Av. Cas. 18,058 (N.Y.Sup.Ct., 1st Dept. 1981) (testimony that "sudden dive" led to pressure change causing plaintiff's hearing loss indicates injury was caused by an "accident"), cited in *Air France v. Saks*, 105 S.Ct. at 1345-46. Rather, the Defendant objects to application of the Warsaw Convention because, assuming the existence of an accident, the Plaintiffs have not alleged injuries which are cognizable under Article 17.

The operative language of Article 17 provides recovery for damages "sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger." Defendant contends that this language refers only to physical injuries. Plaintiffs respond that no such limitation is implied.

Among the cases relied on by Plaintiffs is *Krystal v. British Overseas Airways Corp.*, 403 F.Supp. 1322 (C.D.Cal. 1975). In *Krystal*, airline passengers brought suit against the airline under the Warsaw Convention for physical and psychological injuries incurred when an airplane was hijacked. *Id.* One of the plaintiff's demands for recovery was

[5]When injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, the injury has not been caused by an "accident" within the meaning of Article 17 of the Warsaw Convention. *Air France v. Saks*, ____ U.S. ____, 105 S.Ct. at 1346. Thus, in *Saks*, the Court held that the plaintiff's hearing loss, which was caused by the normal operation of the aircraft's pressurization system, was not compensable under the Warsaw Convention. *Id.*

based solely on mental distress, which included fright, anxiety, stress, loss of sleep, and fear. *Id.* at 1322-23. The court ruled that mental injuries, standing alone, are compensable under the Warsaw Convention. *Id.* at 1324. In reaching this conclusion, the court quoted extensively from *Husserl v. Swiss Air Transport Co.*, 388 F.Supp.1238 (S.D.N.Y 1975), reasoning that "[t]o effect the treaty's avowed purpose, the types of injuries enumerated should be construed expansively to encompass as many types of injury as are colorably within the ambit of the enumerated types. Mental and psychosomatic injuries are colorably within the ambit and are, therefore, comprehended by Article 17." *Id.* at 1323-24 (quoting *Husserl*, 388 F.Supp. at 1250).

Indisputably, that portion of the *Krystal* decision which concludes that a hijacking is an accident within the meaning of Article 17, *see Krystal*, 403 F.Supp. at 1323, remains valid in light of *Saks*. In fact, *Krystal* is cited with approval by the Supreme Court in *Saks* for the proposition that the definition of "accident" under Article 17 should be flexibly applied. *Air France v. Saks*, 105 S.Ct. at 1345. Whether the phrase "bodily injury" should, similarly, be given an expansive construction was not addressed by the Supreme Court. However, the Court did provide some guidance on how this issue is to be resolved.

In *Saks*, the Supreme Court set forth an approach to be utilized in determining the meaning of terms contained in the Warsaw Convention. *Id.* at 1342. Upon application of this approach, this Court concludes, as discussed below, that mental anguish, alone, is not encompassed within the meaning of "bodily injury" under the Warsaw Convention.

French was the sole official language of the Warsaw Convention. Accordingly, in *Block v. Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905, 88 S.Ct. 2053 (1968), the Fifth Circuit held that the binding meaning of the terms of the Warsaw Convention is

the French legal meaning of those terms.[6] The Supreme Court in *Saks* reaffirmed this method of analysis. *Air France v. Saks*, 105 S.Ct. at 1342 (citing with approval *Block*). Thus, doubt is cast upon *Krystal*, and other cases following the district court decision in *Husserl*, since the *Husserl* court expressly declined to view as binding the French legal meaning or interpretation of the treaty. *Husserl v. Swiss Air Transportation Company, Ltd.*, 388 F.Supp. at 1249.[7]

It is this Court's responsibilty to give the specific words of the Warsaw Convention a meaning consistent with the shared expectations of the signatories of the treaty. *Air France v. Saks*, 105S.Ct. at 134. Thus, as the Supreme Court has instructed, "[w]e look to French legal meaning for guidance as to these expectations. . . ." *Id.*

The French text of the relevant part of Article 17, relating to injury, reads: "Le transporteur est responsable du dommage survenu en cas de *mort*, de *blessure ou de toute autre lésion corporelle* subie par un voyageur. . . ." Quoted in *Air France v. Saks*, 105 S.Ct. at 1338 n.2 (emphasis added).

The official American translation of the above-quoted portion of Article 17 reads: "The carrier shall be liable for damage sustained in the event of the *death* or *wounding* of a passenger *or any other bodily injury* suffered by a passenger. . . ." 49 Stat. 3000 (emphasis added).

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[6]In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

[7]Judge Tyler, speaking for the court in *Husserl*, stated: "It is true that this country adhered to the French text of the Convention, as did all of the signatories . . . but, as I now view the matter, that fact does not mean that the French legal meaning of the words or the French legal interpretation of the treaty is binding." 388 F.Supp. at 1249.

As stated in *Burnett v. Trans World Airlines, Inc.*, 368 F.Supp. 1152, 1156 (D.N.M. 1973), the controlling phrase would seem to be "ou de toute autre lésion corporelle" (or any other bodily injury), for both the terms "mort" (death) and "blessure" (wound) are by necessity incorporated within it. "Lésion corporelle" (bodily injury) has been defined to mean "an infringement of physical integrity (l'atteinte à l'integrité physique)." *Id.* (quoting Henry P. de Vries translation). The *Burnett* court observed, as does this Court, that the definition does not indicate that mental injuries are to be included within its domain. *Id.*[8]

"In interpreting a treaty it is proper, of course, to refer to the records of its drafting and negotiations." *Air France v. Saks*, 105 S.Ct. at 1343 (citing *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431, 63 S.Ct. 672, 677 (1943)). After reviewing the legislative history and initial drafts of the Warsaw Convention, the court in *Burnett* concluded that "the inference is strong that the Convention intended to narrow the otherwise broad scope of liablity under the former draft and preclude recovery for mental anguish alone." *Burnett v. Trans World Airlines, Inc.*, 368 F.Supp. at 1157. Because the *Burnett* court utilized an approach which was later declared by the Supreme Court in *Saks* to be the proper method of analysis, this Court finds the *Burnett* opinion to be well-reasoned, persuasive authority for the proposition that mental anguish alone is not encompassed

[8]The *Burnett* court also rejected the contention that "blessure" (wound) encompasses mental anguish. 368 F.Supp. at 1156. The court reasoned: "The critical words of Article 17, 'mort, de blessure, and ou de toute autre lesion corporelle' must be examined together in order to ascertain their contextual meaning. Although the *French-English Dictionary of Legal Terms* by Jules Jeraute defines "blessure" to include not only a wound but also hurt or injury, when the term is modified by the subsequent phrase of the provision, it seems apparent that the drafters utilized the word in solely a physical sense." *Id.*

within the French legal meaning of bodily injury.[9] This Court concludes, therefore, that mental anguish alone is not compensable under the Warsaw Convention.

DISPOSITION OF COMPLAINTS

A. *Cases Removed Pursuant to the Federal Courts' Treaty Jurisdiction.*

Many of the suits filed in this case were removed pursuant to the federal courts' treaty jurisdiction. 28 U.S.C. §1331. Absent an allegation of physical injury, the Complaints in this case do not state a cause of action under the Warsaw Convention. Since the Warsaw Convention claim which was the basis for treaty jurisdiction is eliminated from the case, this Court has discretion to remand the remaining state claims. *In re Carter*, 618 F.2d 1093 (5th Cir. 1980), *cert. denied*, 450 U.S. 949, 101 S.Ct. 1410 (1981). The parties, however, indicated their preference at the January 21, 1986 hearing, for this Court to retain jurisdiction over the pendent state law claims. *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130 (1966). This Court, therefore, will dispose of all claims raised. For the reasons set forth in the "Discussion" section, it is

ORDERED AND ADJUDGED that the following cases are DISMISSED with prejudice:

1. *Connie Gale and Michael Gale v. Eastern Air Lines*, Case No. 83-1950-CIV-DAVIS

[9]During the January 21, 1986 hearing, Plaintiff brought to this Court's attention the case of *Palagonia v. TransWorld Airlines*, 442 N.Y.S. 2d 670, 110 Misc. 2d 478 (N.Y. 1978), in which a state court held that the term "lesion corporelle" as used in the Warsaw Convention includes the concept of mental injury, even in the absence of concomitant physical manifestation. *Palagonia*, 442 N.Y.S. 2d at 671. Although the state court in *Palagonia* looked to the French text of the Warsaw convention, this Court is unpersuaded that the result reached by the *Palagonia* court is correct. Instead, as expressed in the above text, the Court concurs with the federal district court's decision in *Burnett*, 368 F.Supp. at 1157.

2. *Michael Gale and Connie Gale v. Eastern Air Lines*, Case No. 83-1951-CIV-ARONOVITZ

3. *Rose Marie Floyd and Terry Floyd v. Eastern Air Lines*, Case No. 83-1949-CIV-NESBITT

4. *Terry Floyd and Rose Marie Floyd v. Eastern Air Lines*, Case No. 84-1700-CIV-HASTINGS

5. *Gloria Patterson and Edmund Patterson v. Eastern Air Lines*, Case No. 83-2193-CIV-KING

6. *Robert Scharhag v. Eastern Air Lines*, Case No. 83-3014-CIV-HOEVELER

7. *Thomas J. Nolan v. Eastern Air Lines*, Case No. 83-3013-CIV-ARONOVITZ

8. *Eugene H. Champ v. Eastern Air Lines*, Case No. 83-3016-CIV-DAVIS

9. *Frederick W. Hoehler v. Eastern Air Lines*, Case No. 83-3017-CIV-NESBITT

10. *Sally Ann Collins v. Eastern Air Lines*, Case No. 83-3078-CIV-ARONOVITZ

11. *Michael R. Dramis v. Eastern Air Lines*, Case No. 83-3079-CIV-HASTINGS

12. *Gary Dix and Sandy Dix v. Eastern Air Lines*, Case No. 84-1701-CIV-DAVIS

13. *Alexander Dix v. Eastern Air Lines*, Case No. 84-0033-CIV-DAVIS

14. *Sandy Dix and Gary Dix v. Eastern Air Lines*, Case No. 84-0030-CIV-DAVIS

15. *Dana Dix v. Eastern Air Lines*, Case No. 84-0032-CIV-SPELLMAN

16. *Bruce Jacobs and Janet Jacobs v. Eastern Air Lines*, Case No. 84-0924-CIV-DAVIS

17. *Janet Jacobs and Bruce Jacobs v. Eastern Air Lines*, Case No. 84-0920-CIV-ATKINS

18. *Alexander Embry v. Eastern Air Lines*, Case No. 84-0922-CIV-PAINE

19. *Salim Khoury and Deborah Khoury v. Eastern Air Lines*, Case No. 84-1703-CIV-ATKINS

20. *Myriam Carrasco v. Eastern Air Lines*, Case No. 84-1258-CIV-DAVIS

21. *Gregory Mantz, Netta Mantz and Harold Mantz v. Eastern Air Lines*, Case No. 85-0654-CIV-NESBITT

22. *Netta Mantz, Harold Mantz and Gregory Mantz v. Eastern Air Lines*, Case No. 85-0653-CIV-HASTINGS

23. *Alfred Goldberg and Shirley Goldberg v. Eastern*, Case No. 84-1956-CIV-DAVIS

24. *Salim Khoury and Deborah Khoury, his wife v. Eastern*, Case No. 84-0923-CIV-KEHOE

B. *Cases Removed Pursuant to the Federal Courts' Diversity Jurisdiction.*

The following two cases were removed from the Court of Pleas of Allegheny County, Pennsylvania to the United States District Court for the Western District of Pennsylvania pursuant to the federal courts' diversity jurisdiction; the cases were then transferred to this Court as ordered by the Judicial Panel on Multidistrict Litigation:

1. *Gerry Ash Seif v. Eastern Air Lines*, Case No. 84-0835-CIV-HASTINGS

2. *Susan Rooney and William Rooney*, Case No. 84-0836-CIV-DAVIS

For the reasons set forth below, it is hereby

ORDERED AND ADJUDGED that the above two enumerated actions are DISMISSED with prejudice.

The above two actions were transferred to this court pursuant to 28 U.S.C. § 1407. In cases of multidistrict litigation transfers, the transferee court ordinarily will apply the substantive law of the transferor forum, including that forum's choice of law rules. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts,* 78 F.R.D. 575, 584 (1977). *See also* Manual for Complex Litigation, Second, §33.23. Thus, this Court, sitting as a transferee court, is obligated to apply the state law that would have been applied by the United States District Court for the Western District of Pennsylvania, the transferor court, had a transfer not occurred.

A federal district court's choice-of-law decision is governed by the choice-of-law rules of the forum state. *Klaxon v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 61 S.Ct. 1020 (1941). Accordingly, the United States District Court for the Western District of Pennsylvania, which was sitting in diversity, would have been obligated to follow Pennsylvania's choice-of-law rules.

> In *Griffith v. United Air Lines,* 416 Pa. 1, 203 A.2d 796 (1964), the Pennsylvania Supreme Court adopted a flexible choice-of-law rule which permits an "analysis of the policies and interests underlying the particular issue before the court" and a determination of which jurisdiction is most intimately concerned with the outcome of the litigation. *Id.* at 21, 22 203 A.2d 796.

American Contract Bridge League v. Nationwide Mutual Fire Insurance Co., 752 F.2d 71, 74 (3d Cir. 1985).

Pennsylvania's "policy, interests, and contacts test," *Id.* at 75, requires application of the substantive law of Florida to the present controversy. In support of this conclusion, the Court notes that the vast majority of the plaintiffs who have

filed suit in this multidistrict action purchased or caused to be purchased their tickets for Eastern Flight No. 855 from Miami International Airport located in Dade County, Florida. The subject flight departed from Miami International Airport. After the engine trouble occurred, apparently somewhere between Miami and the Bahamas, the subject aircraft turned around and landed in Miami, Florida. In sum, Florida appears to be the state with the most significant interests and involvement with the subject litigation.

The sufficiency of the complaints will, therefore, be determined by Florida law. For the reasons set forth above in the "Discussion" section of this Order, this Court concludes that the *Seif* and *Rooney* complaints have failed to state claims upon which relief may be granted. Both complaints contain no factual allegations of a cognizable physical injury, nor do they contain sufficient factual allegations of intentional or reckless misconduct. Dismissal is, therefore, appropriate.

C. *Cases Alleging Physical Impact and/or Injury.*

The following two cases, both removed to this Court pursuant to the federal courts' treaty jurisdiction, contain allegations of physical impact and/or injury:

1. *Manuel Crespo and Norma Crespo v. Eastern Air Lines, Inc.*, Case No. 84-0502-CIV-DAVIS

2. *Kevin King, Ben King, and Mary Jo King v. Eastern Air Lines, Inc.*, Case No. 84-1259-CIV-GONZALEZ

It is hereby

ORDERED AND ADJUDGED that Case No. 84-0502-CIV-DAVIS, *Manuel Crespo and Norma Crespo v. Eastern Airlines, Inc.*, is DISMISSED with prejudice. As set forth in the "Discussion" section of this Order, absent a sufficient factual allegation of physical injury, the Plaintiffs have

stated no cause of action. Here, Plaintiffs asserted in their original Complaint that they suffered "physical impact and injury, severe and permanent mental pain and anguish, fright, distress and an inability to lead a normal life." A careful reading of the Complaint, however, reveals no factual allegations in support of the claim of physical impact or injury. While it is true that Plaintiffs need not plead each and every element to state a cause of action, it is necessary that Plaintiffs plead facts sufficient to put the Defendant on notice of the charges against which it must defend. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102 (1957). The Plaintiffs, here, have failed to sufficiently allege facts concerning the alleged physical impact or injury. The Complaint is, therefore, dismissed.

It is further

ORDERED AND ADJUDGED that Defendant's Motion for Judgment on the Pleadings is DENIED in Case No. 84-1259-CIV-GONZALEZ, *Kevin King, Ben King and Mary Jo King v. Eastern Air Lines, Inc.* In their original Complaint, Plaintiffs alleged that "[a]s a direct and proximate result of defendant, EASTERN AIRLINE INC.'s breach of contract, MARY JO KING's pregnancy was adversely affected and BEN KING was born prematurely. As a consequence of his premature birth, BEN KING was injured in and about his body and extremeties, suffered pain therefrom, suffered physical handicap disability and disfigurement and loss of enjoyment of a normal life." The Court finds that these factual allegations are sufficient to withstand a motion for judgment on the pleadings. The Defendant's motion is therefore denied in Case No. 84-1259-CIV-GONZALEZ. That case is hereby transferred back to the calendar of the Honorable Jose A. Gonzalez. All further documents filed in the *King* case are to bear the following number and initials: CASE NO. 84-1259-CIV-GONZALEZ.

DONE AND ORDERED in Chambers at Miami, Florida this 3rd day of February, 1986.

/s/ Edward B. Davis

EDWARD B. DAVIS
United States District Judge

APPENDIX C

SUPREME COURT OF FLORIDA

No. 73,395

EASTERN AIRLINES, INC.,

Petitioner,

vs.

CHARLES KING,

Respondent.

[February 15, 1990]

GRIMES, J.

We review *King v. Eastern Airlines, Inc.*, 536 So.2d 1023 (Fla. 3d DCA 1987), in which the Third District Court of Appeal partially reversed a judgment on the pleadings, Our jurisdiction is based on conflict with *Metropolitan Life Insurance Co. v. McCarson*, 467 So.2d 277 (Fla. 1985), and *Brown v. Cadillac Motor Car Division*, 468 So.2d 903 (Fla. 1985). Art. V, § 3(b)(3), Fla. Const.

The facts as alleged in the complaint were as follows. On May 5, 1983, the respondent, Charles King, was a passenger on Eastern Airlines' Flight #855 departing from Miami International Airport, bound for Nassau, Bahamas. En route one of the plane's three engines failed, so the flight crew turned the plane around to return to Miami. After turning around, the plane's other two engines failed. The crew and passengers were prepared to ditch the plane as it lost altitude. Finally, after an extended period, the crew was able to restart one engine and land the plane at Miami International Airport.

King sued Eastern Airlines for, *inter alia*, damages allegedly incurred as a result of Eastern's reckless or intentional infliction of mental distress and for damages arising under the Warsaw Convention.[1] Specifically, count III of King's amended complaint alleged that Eastern failed to properly inspect, maintain, and operate its aircraft and that "Eastern's records reveal at least one dozen prior instances of engine failures due to missing O-rings [oil seals], and yet Eastern failed to institute appropriate procedures to cure this maintenance problem despite such knowledge." King further alleged that this constitutes an "entire want of care" and "indifference" and implies "such wantonness, willfulness, and malice as would justify punitive damages." In count IV, King claimed damages under the Warsaw Convention by reason of this negligent or willful misconduct.

The circuit court stayed action in this lawsuit pending the outcome of related federal actions filed by other passengers in the United States District Court for the Southern District of Florida. The district court entered judgments on the pleadings in Eastern's favor based on the failure to state a cause of action. *In re Eastern Airlines, Inc. Engine Failure, Miami Int'l Airport on May 5, 1983*, 629 F.Supp. 307 (S.D. Fla. 1986). Persuaded by the federal district court's reasoning, the state circuit court then entered a judgment on the pleadings in favor of Eastern and against King. On appeal a panel of the Third District Court of Appeal reversed and reinstated the claim for intentional infliction of mental distress but affirmed the dismissal of the claim for emotional distress under the Warsaw Convention. *King v. Eastern Airlines, Inc.*, 536 So.2d 1023 (Fla. 3d DCA 1987). On motion for rehearing, the court again affirmed the dismissal of the Warsaw Convention claim but held that the

[1]Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, October 12, 1929, adhered to by the United States June 27, 1934, 49 Stat. 3000, 3014, reprinted in 49 U.S.C. note following § 1502.

unavailability of a cause of action under the Warsaw Convention did not preclude other forms of relief. *Id.* at 1030, 1032. Thereafter, in a split vote on rehearing en banc, the court adhered to the decision but announced different reasons for reversing the dismissal of the state claim for emotional distress. *Id.* at 1032.

The related cases in federal court were appealed to the Eleventh Circuit Court of Appeals. That court relied on the Third District's decision in *King* to uphold the state claim for mental distress but noted that the issue was pending in this Court. *Floyd v. Eastern Airlines, Inc.*, 872 F. 2d 1462, 1467 (11th Cir. 1989). The Eleventh Circuit Court of Appeals then concluded that the Warsaw Convention does allow recovery for purely mental injuries unaccompanied by physical trauma. *Id.* at 1480. Further, the court ruled that to the extent that the cause of action for intentional infliction of emotional distress under Florida law conflicts with the cause of action under the Warsaw Convention, Florida law was preempted. *Id.* at 1482.

This Court first recognized the tort of intentional infliction of emotional distress in *Metropolitan Life Insurance Co. v. McCarson*. In *McCarson* we approved the adoption of section 46, Restatement (Second) of Torts (1965), which states:

> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

In that case, however, we held that the court below had not conformed its findings to the comments to section 46 which explain the application of the tort.

Comments d and i to section 46 are particularly pertinent to our consideration:

It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

. . . .

i. *Intention and recklessness.* The rule stated in this Section applies where the actor desires to inflict severe emotional distress, and also where he knows that such distress is certain, or substantially certain, to result from his conduct. It applies also where he acts reckless, as that term is defined in § 500, in deliberate disregard of a high degree of probability that the emotional distress will follow.

Section 500, Restatement (Second) of Torts (1965), provides:

> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Comment b of section 500 further elaborates that "[c]onduct cannot be in reckless disregard of the safety of others unless the act or omission is itself intended . . . ."

Applying these principles to the present case, it is clear that King has failed to state a claim for reckless or intentional infliction of emotional distress. The allegations that Eastern failed to properly inspect, maintain, and operate its aircraft rise no higher than negligence. The fact that there may have been at least one dozen prior instances of missing O-rings causing engine failures does not reflect "extreme and outrageous conduct intentionally or recklessly" causing emotional distress. The balance of count III contains only conclusions. *See Price v. Morgan*, 436 So.2d 1116 (Fla. 5th DCA 1983) (a pleading is insufficient if it contains merely conclusions as opposed to ultimate facts supporting each element of the cause of action).

As *amicus* points out, it is incongruous that Eastern would recklessly or intentionally place its passengers, crews, and multimillion dollar airplanes in such peril. Our conclusion is reinforced by King's allegation that, despite Eastern's knowledge of the prior engine failures, Eastern failed to take "appropriate" procedures to correct the problem. Failing to take "appropriate" action to correct the problems would appear to negate an intentional act or an intentional failure to act on Eastern's part. Significantly, King's complaint does not allege that Eastern knew or should have known that the procedures were inappropriate.

The majority opinion below represents a misapplication of the principle established in *Metropolitan Life Insurance Co. v. McCarson*. Furthermore, as noted by dissenting Judge Schwartz:

> In essence, the majority view amounts to establishing an exception to the recently reaffirmed "impact rule," *Brown v. Cadillac Motor Car Div.*, 468 So.2d 903 (Fla. 1985), which would arise in

every case in which the defendant acts recklessly. It would apply when, for example, a highly intoxicated driver recklessly operates his vehicle and narrowly misses but severely frightens a plaintiff, or when a plaintiff uses and becomes mentally concerned over some potential harm, but is not actually "impacted" or physically injured by a product—like a Mustang or a Dalkon Shield—which may have been recklessly manufactured. Whatever the law of Florida may previously have been, see *Crane v. Loftin*, 70 So.2d 574 (Fla. 1954) (dictum); *Kirksey v. Jernigan*, 45 So.2d 188 (Fla. 1950) (dictum), it is very clear that there is no such exception under the present law of our state.

536 So.2d at 1036-37 (Schwartz, J., dissenting).

While not the basis of our jurisdiction, we deem it appropriate to address the question of whether King has stated a cause of action under the Warsaw Convention. The Warsaw Convention is an international treaty to which the United States is a party. *Air France v. Saks*, 470 U.S. 392 (1985). The Convention applies "to all international transportation of persons, baggage, or goods performed by aircraft for hire." Warsaw Convention art. 1. The Convention creates a presumption that the carrier is liable for damage sustained by passengers as a result of the carrier's conduct, shifting the burden of proof to the carrier to show that it took all necessary measures, or that it was impossible to take such measures, to avoid the damage. Warsaw Convention art. 17, 20. The Convention originally placed a limit of $8,300 on the carrier's liability. Warsaw Convention art. 22. Under the Montreal Agreement of 1966,[3] which is not a treaty of the United States, the airlines agreed to raise the limit of liability to $75,000 and waive the

[3]Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18900, approved by CAB Order No. 28680, May 13, 1966, 31 Fed.Reg. 7302 (1966).

due care defenses of article 20 for flights originating, terminating, or having a stopping point in the United States. *Floyd*, 872 F.2d at 1468.

Article 17 of the Convention establishes the liability of international air carriers for injuries to passengers. The unofficial United States translation of article 17 states:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3014, reprinted at note following 49 U.S.C. § 1502. However, the French text of the Warsaw Convention is the only official text and the one officially adopted and ratified by the Senate. *See Floyd*, 872 F.2d at 1470. The United States Supreme Court has held that the French legal meaning controls "not because 'we are forever chained to French law' by the Convention, but because it is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Saks*, 470 U.S. at 399 (citation omitted). The French text of article 17 reads:

> Le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit â bord de l'aéronef au cours de toutes opérations d'embarquement et de débarquement.

Both parties conceded at oral argument that this case involved an "accident" occurring on board the aircraft. *See Saks*, 470 U.S. at 405 (accident defined as an "unexpected or unusual happening or event that is external to the passenger"). Therefore, the question we must address is

whether the use of the language of article 17 was meant to encompass purely emotional distress.

The courts have sharply split on this issue. Those which permit recovery include *Floyd*, 872 F.2d 1462; *Karfunkel v. Compagnie Nationale Air France*, 427 F. Supp. 971 (S.D.N.Y. 1977); *Krystal v. British Overseas Airways Corp.*, 403 F. Supp. 1322 (C.D. Cal. 1975); *Husserl v. Swiss Air Transport Co.*, 388 F. Supp. 1238 (S.D.N.Y. 1975); *Palagonia v. Trans World Airlines, Inc.*, 110 Misc.2d 478, 442 N.Y.S. 2d 670, 672 (Sup. Ct. 1978). Other courts have determined that article 17 does not contemplate damages for emotional distress unaccompanied by physical trauma. *Burnett v. Trans World Airlines, Inc.*, 368 F. Supp. 1152 (D.N.M. 1973); *Rosman v. Trans World Airlines, Inc.*, 34 N.Y. 2d 385, 358 N.Y.S.2d 97 (1974).

After careful review and consideration, we are persuaded by the extensive and thorough resolution of this matter in *Floyd*. The *Floyd* court exhaustively examined the French legal meaning of the text, the concurrent and subsequent legislative history of the Warsaw Convention, the conduct of the parties, and the cases interpreting article 17.[3] The court determined that French civil law permits recovery for any damage, whether material or moral, including mental suffering unaccompanied by physical injury. *Id.* at 1472. We agree that the analysis of the cases which preclude recovery for emotional distress is flawed because those courts did not carefully consider the French legal meaning of *lesion corporelle* or the negotiating history of the Convention. *Id.* at 1476-78. In denying recovery, those courts have erroneously imposed upon article 17 the common law requirement that emotional injury must accompany physical injury in order to be compensable.

[3]The French words "lesion corporelle" are literally translated as "bodily injury."

Because we found that King failed to state a claim under state law it is unnecessary for us to discuss whether a state law claim for emotional distress would be preempted by the Warsaw Convention. However, we will address his claim for damages in excess of $75,000 under the Warsaw Convention. Article 25 of the Convention states:

> (1) The carrier shall not be liable to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be the equivalent to wilful misconduct.[4]

The Eleventh Circuit determined that article 25 did not provide a separate cause of action for punitive damages but instead served only to lift the strict limit on liability for compensatory damages in the case of wilful acts. *Floyd*, 872 F. 2d at 1485.

We have already determined that King's allegations are not sufficient to support a claim for reckless or intentional conduct. It follows that we must further hold that he has no basis to assert a claim alleging "wilful misconduct." We reach this conclusion whether we apply the federal interpretation of "wilful misconduct," *Butler v. Aeromexico*, 774 F.2d 429 (11th Cir. 1985), or the Florida standard for the recovery of punitive damages. *White Construction Co. v. DuPont*, 455 So.2d 1026 (Fla. 1984).

In conclusion, we disapprove the decision below with respect to both the state claim for emotional distress and that under the Warsaw Convention. We hold that King has failed to state a claim for emotional distress under Florida law. However, he does have a claim for emotional distress

[4]We use the English translation of this article since neither party has suggested an alternative French legal meaning. *See Floyd v. Eastern Airlines, Inc.*, 872 F. 2d 1462, 1462 n.34 (11th Cir. 1989).

under article 17 of the Warsaw Convention but any recovery is limited to a maximum of $75,000. Article 25 of the Convention does not apply because the complaint fails to state a claim for "wilful misconduct." We remand the case for further proceedings in accordance with this opinion.

It is so ordered.

OVERTON, SHAW and KOGAN, JJ., Concur

EHRLICH, C.J., Concurs specially with an opinion, in which SHAW and BARKETT, JJ., Concur

BARKETT, J., Concurs specially with an opinion

McDONALD, J., Concurs in part and dissents in part with an opinion

EHRLICH, C.J., specially concurring.

I concur in all aspects of the majority opinion except the majority's approval of the following language quoted from Judge Schwartz's dissent in the decision below

> "In essence, the majority view amounts to establishing an exception to the recently reaffirmed 'impact rule,' *Brown v. Cadillac Motor Car Div.*, 468 So.2d 903 (Fla. 1985), which would arise in every case in which the defendant acts recklessly. It would apply when, for example, a highly intoxicated driver recklessly operates his vehicle and narrowly misses but severely frightens a plaintiff, or when a plaintiff uses and becomes mentally concerned over some potential harm, but is not actually 'impacted' or physically injured by a product—like a Mustang or a Dalkon Shield—which may have been recklessly manufactured. Whatever the law of Florida may previously have been, see *Crane v. Loftin*, 70 So.2d 574 (Fla. 1954)

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

> (dictum); *Kirksey v. Jernigan*, 45 So.2d 188 (Fla. 1950) (dictum), it is very clear that there is no such exception under the present law of our state."

Slip op. at 5-6 (quoting 536 So.2d 1023, 1036-37 (Fla. 3d DCA 1987) (Schwartz, J., dissenting)). I write separately to point out the confusion or misunderstanding which I fear may be created by the quoted language. This quote should not be taken to mean that impact or a physical manifestation of psychological trauma is required in connection with the tort of intentional infliction of emotional distress.

This Court has long recognized the tort of negligent infliction of emotional distress where the distress is accompanied by physical impact. *See, e.g., Gilliam v. Stewart*, 291 So.2d 593 (Fla. 1974); *Clark v., Choctawhatchee Electric Co-Operative*, 107 So.2d 609 (Fla. 1958). More recently, in *Champion v. Gray*, 478 So.2d 17 (Fla. 1985), and *Brown v. Cadillac Motor Car Division*, 468 So.2d 903 (Fla. 1985), we modified, in some limited situations, the requirement of an impact in connection with a claim of negligent infliction of emotional distress. However, in those situations where impact is unnecessary, a clearly discernible physical impairment must accompany or occur within a short time after the negligently inflicted psychic injury. 468 So.2d at 904; 478 So.2d at 17.

As noted by the majority, this Court first recognized the tort of intentional infliction of emotional distress by adopting section 46, of the Restatement (Second) of Torts (1965), in *Metropolitan Life Insurance Co. v. McCarson*, 467 So.2d 277 (Fla. 1985). While there must be impact or an objectively discernible physical manifestation before a cause of action arising from simple negligence may exist, no requirement of impact or physical injury is contained in section 46. In fact, comment k of that section states that the rule

> is not . . . limited to cases where there has been bodily harm; and if the conduct is sufficiently extreme and outrageous there may be liability for the emotional distress alone, without such harm. In such cases the courts may perhaps tend to look for more in the way of outrage as a guarantee that the claim is genuine; but if the enormity of the outrage carries conviction that there has in fact been severe emotional distress, bodily harm is not required.

Where the psychic injury is based on simple negligence, proof of impact or objective physical manifestation affords a guarantee that the mental distress is genuine. Whereas, the clearly outrageous nature of the conduct necessary under section 46 serves as adequate assurance that the resulting mental disturbance is not fictitious. *See* W. Keeton, *Prosser and Keeton on Torts*, §§12 & 54 (5th ed. 1984). This distinction between causes of action based on negligent and intentional infliction of emotional distress was recognized by this Court in *Brown*. We noted that our holding in that case that there is no cause of action within this state for psychological trauma alone resulting from simple negligence was not intended to disturb prior decisions of the district courts allowing such damages in intentional tort actions based on outrageous conduct. 468 So.2d at 904 n.*.*

SHAW and BARKETT, JJ., Concur

BARKETT, J., specially concurring.

I concur in the Court's judgment that prior decisions would bar relief for the intentional infliction of mental distress in this case. I believe, however, that persons who have suffered great mental anguish through the extreme negligence of a tortfeasor, such as Eastern's in this case, should be permitted a remedy.

---

*For this reason, I do not believe that this Court's decision in Brown v. Cadillac Motor Car Division, 468 So.2d 903 (Fla. 1985), is in conflict with the decision under review.

McDONALD, J. . concurring in part and dissenting in part.

I would hold that King has no cause of action against Eastern under Florida law or under the Warsaw Convention unless his mental anguish evolves into an objectively discernible bodily injury similar to that described in *Champion v. Gray*, 478 So.2d 17 (Fla. 1985), and *Brown v. Cadillac Motor Car Division*, 468 So.2d 903 (Fla. 1985).

In reaching this conclusion I am much more persuaded by *Burnett v. Trans World Airlines, Inc.*, 368 F.Supp. 1152 (D.N.M. 1973), than I am by *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462 (11th Cir. 1989), even though the latter discusses the former. *Burnett* aptly points to the difference between *lésion corporelle* and *lésion mentale*. As the court further reported in *Burnett*, the First International Conference on Private Air Law had been interpreted to allow mental distress in a myriad of circumstances. It then noted:

> [T]he Conference appointed a group of air law experts who would report to the Second International Conference in Warsaw in 1929. The text they submitted became the mode for present Article 17 and it provided in pertinent part:
>
> "Le transpoteur est responsable du dommage survenu pendant le transport:
>
> (a) en cas de mort, de blessure ou de toute autre lesion corporelle subie par un voyageur."

By thus restricting recovery to bodily injuries, the inference is strong that the Convention intended to narrow the otherwise broad scope of liability under the former draft and preclude recovery for mental anguish alone. Had the delegates desired otherwise, there would have been no reason to so substantially modify the proposed draft of the First Conference.

Concurring in this conclusion, Professor Juglart of the Law Faculty of the University of Paris has proffered the opinion that Article 17, as now constituted, does not permit recovery for mental injuries. He concludes that to so recover, the Article would have to undergo amendment to read "lesion corporelle ou mentale."

368 F.Supp. at 1157 (footnotes omitted).

It thus appears to me that some form of bodily injury must be the result of an airlines' wrong before there can be a recovery. I can not, and do not, equate mental stress to a bodily injury and do not believe it contemplated by the Warsaw Convention.

I concur with the majority opinion in reference to the discussion of Florida law, but dissent on the effect of the Warsaw Convention treaty.

APPENDIX D

[FILED JAN 11 1990]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-5381

ROSE MARIE FLOYD and TERRY FLOYD, her husband, CONNIE GALE and MICHAEL GALE, her husband, MICHAEL GALE and CONNIE GALE, his wife, GLORIA PATTERSON, EDMOND PATTERSON, THOMAS J. NOLAN, ROBERT SCHARAG, EUGENE H. CHAMP, FREDERICK W. HOEHLER, IV, SALLY ANN COLLINS, MICHAEL R. DRAMIS, SANDY DIX and GARY DIX, her husband, DANA DIX, by and through her parents GARY DIX and SANDY DIX, as guardians and next friends, ALEXANDER DIX, by and through his parents GARY DIX and SANDY DIX, as guardians and next friends, GERRI ASH SELF, SUSAN ROONEY and WILLIAM ROONEY, her husband, JANET JACOBS and BRUCE JACOBS, her husband, ALEXANDER EMBRY, SALIM KHOURY and DEBORARH KHOURY, his wife, BRUCE JACOBS and JANET JACOBS, his wife, MYRIAM CARRASCO (f/k/a MYRIAM RILEY) TERRY FLOYD and ROSE MARIE FLOYD, GARY DIX and SANDY DIX, his wife, SALIM KHOURY and DEBORAH KHOURY, his wife, GREGORY MANTZ, by and through his parents, NETTA MANTZ and HAROLD D. MANTZ, as guardians and next friends NETTA MANTZ, HAROLD MANTZ, GREGORY D. MANTZ, by and through his father HAROLD D. MANTZ,

Plaintiffs-Appellants,

versus

EASTERN AIRLINES, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion ____, 11 Cir., 198__, ____F.2d____).

(January 11, 1990)

Before JOHNSON AND ANDERSON, Circuit Judges, and ATKINS*, Senior District Judge.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:
/s/ [Illegible]
United States Circuit Judge

*Hon. C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

No. 89-1598

In The

Supreme Court of the United States

October Term, 1989

EASTERN AIRLINES, INC.,

Petitioner,

v.

ROSE MARIE FLOYD and
TERRY FLOYD, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

The petitioner has presented two questions for review – one arising under the Warsaw Convention, and another purportedly arising under the Montreal Agreement. Since Article 17 of the Warsaw Convention (which is the only provision of the Convention in issue here) was not changed in any way by the Montreal Agreement, we believe the two questions are really only a single question. We restate that question neutrally as follows:

> Whether Article 17 of the Warsaw Convention provides a remedy for psychic injury and emotional distress unaccompanied by physical injury, when caused by an accident in international air transportation.

The petitioner has also included in its argument a third question which it suggests that the Court "may wish to address" if certiorari is granted. We will explain in the argument which follows that this third question is not properly before the Court, because it is entirely moot at this point in the proceedings.

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Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Rose Marie Floyd and Terry Floyd, et al., respectfully request that this Court deny the petition for writ of certiorari seeking review of the Eleventh Circuit's decision in this case.

STATEMENT OF THE CASE

Eastern's statement of the case is accurate. Unfortunately, its subsequent argument – which asserts that the Eleventh Circuit's opinion opens the door to a "flood of

fictitious or frivolous claims" for "unlimited damages" not contemplated by Article 17 of the Warsaw Convention – is hyperbolic. The opinion does no such thing, and we deem it prudent to emphasize two aspects of the case briefly to ensure that the Court is not misled by the petitioner's rhetorical excesses.

The flight in question departed Miami International Airport on May 5, 1983, bound for Nassau, in the Bahamas. En route to Nassau, one of the airplane's three jet engines lost oil pressure, and it was shut down by the flight crew. The airplane was turned around to return to Miami. Shortly thereafter, oil pressure was lost on the second and third engines, and those engines failed. Without power, the airplane began losing altitude rapidly, and the passengers were told that the airplane would be ditched in the Atlantic Ocean. Understandably, the engine failures and the announcement of the impending crash landing caused a considerable amount of mental distress among the passengers. Fortunately, after an extended period of descending flight without power, the flight crew was able to restart the engine which had initially been shut down, and land the airplane safely at Miami International Airport.

Following the incident, it was discovered that, during routine maintenance on each engine prior to flight, Eastern's maintenance personnel had failed to install a required "O-ring" to seal against oil leaks. The result was that oil in the engines had been pumped overboard through the gaps left by the omitted O-rings. It was also discovered that Eastern had experienced no less than a dozen prior engine failures for the identical reason, but that Eastern had done nothing to educate its maintenance

personnel or otherwise correct this oft-repeated life-threatening omission. The incident was clearly an "accident" within the meaning of that term in Article 17 of the Warsaw Convention, and the passengers' mental distress was both genuine and severe. At least two of the passengers suffered physical injury from their mental distress.

All of these things were alleged in the several amended complaints (*see* R. 4-11) – and because Eastern obtained a "judgment on the pleadings", all of these things must be accepted as true at this point in the proceedings. There is therefore no basis whatsoever for Eastern's suggestion that the plaintiffs' mental injuries are "fictitious or frivolous", or otherwise undeserving of compensation. The Eleventh Circuit's opinion also does not create liability not contemplated by Article 17; it holds just the opposite – that liability under these circumstances *is* contemplated by Article 17. And because the reasoning by which the lower court reached that conclusion ought to inform this Court's decision as to whether certiorari should be granted, that reasoning deserves to be briefly highlighted here.

The court reasoned as follows:

(1) It is now uniformly recognized that Article 17 of the Warsaw Convention creates a cause of action for personal injury in its own right, instead of merely placing limitations upon recoveries under local law.

(2) The nature of Article 17's cause of action depends upon its "French legal meaning", and must be determined by construction of the official French text,

rather than the unofficial English translation. *Air France v. Saks*, 470 U.S. 392 (1985).

(3) Because Eastern has conceded that an "accident" occurred "on board the aircraft" within the meaning of Article 17, the narrow question is whether the phrase "lésion corporelle" encompasses recovery for purely mental injury, or whether recovery for mental injury is recoverable only when accompanied by a physical impact or physical injury.

(4) French civil law permits recovery for any damage, whether mental or physical; the French legal meaning of "lésion corporelle" is "personal injury", rather than "bodily injury"; and the "impact rule" which Eastern urges as a limitation upon the phrase is an invention of the common law (which has now been relaxed or overruled in almost every jurisdiction) which has no counterpart in French civil law.

(5) The minutes of the 1929 Warsaw Convention itself shed no light on the question. However, the 1966 Montreal Agreement (which modified the Convention in several aspects unrelated to Article 17) uses the phrases "personal injury" and "bodily injury" interchangeably when referring to compensable injuries. The notice to passengers required by the Montreal Agreement also utilizes the phrase "personal injury", instead of the phrase "bodily injury". The authentic English text of the subsequent Guatemala City Protocol also substitutes the phrase "personal injury" for "wounding or other bodily injury" in the translation of Article 17. And all of this subsequent "legislative history" is persuasive of the initial meaning of the phrase "lésion corporelle".

(6) Most judicial decisions which have considered the question have held that Article 17 creates a cause of action for purely mental injury, and the two early decisions which read Article 17 differently are flawed. *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385, 358 N.Y.S.2d 97, 314 N.E.2d 848 (1974), is flawed because it construed the English translation rather than the original French text, a construction declared impermissible in *Air France v. Saks, supra*. *Burnett v. Trans World Airlines, Inc.*, 368 F. Supp. 1152 (D.N.M. 1973), is flawed for various additional reasons. And neither case has been followed by any court in the last 15 years on the point in issue.

(7) As a result, Article 17 provides a cause of action for compensatory damages for mental injury, unencumbered by the common law's "impact rule". The damages recoverable are limited to $75,000.00 per claim, unless the plaintiffs prove "wilful misconduct", as the Convention elsewhere provides.

There is an additional reason for the result reached by the Eleventh Circuit which it did not state, but which is worth a rhetorical question here. If (as Eastern contends) the phrase "lésion corporelle" excludes a recovery of damages for mental injury, then how can it include a recovery of damages for mental injury *accompanied* by physical injury (as Eastern concedes it does)? The phrase either includes or excludes such a recovery, but it clearly cannot do both. Therefore, even if the Court should be unpersuaded by the Eleventh Circuit's reasoning, it ought to be persuaded that the correct result was reached.

Finally, we emphasize that, after the Eleventh Circuit's opinion was filed, the Florida Supreme Court held

that a similarly situated plaintiff had no state law causes of action on the facts in this case, because of the common law's "impact rule". (App. C-1). The Eleventh Circuit's opinion expressly notes: "Of course, if there is no state law cause of action, there would be no question of preemption. Our discussion of the preemption issue would become moot." (App. A-32). Eastern's suggestion that the Court "may wish to consider" the Eleventh Circuit's disposition of the preemption issue if it grants certiorari is therefore a suggestion to consider an issue which is now entirely moot.

REASONS FOR DENYING THE WRIT

1. The conflicts relied upon by Eastern are stale and insignificant, and they therefore need no resolution by this Court.

The Eleventh Circuit is the first federal court of appeals to decide the question presented here, so there is no present conflict in the decisional law among the federal appellate courts. And of the nine decisions which presently exist on the question, only two (the very first two to decide the question, more than 15 years ago) have reached a contrary result. One of those decisions – *Burnett v. Trans World Airlines, Inc.*, 368 F. Supp. 1152 (D.N.M. 1973) – is a decision of a United States District Court; and if Rule 10 means what it says, that conflict is too insignificant to justify the extraordinary intervention of this Court. The other decision – *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385, 358 N.Y.S.2d 97, 314 N.E.2d 848 (1974) – is a decision of a state court of last resort, so the conflict is obviously a somewhat weightier one. However,

the *Rosman* court analyzed the issue in a manner which this Court later declared impermissible, so the conflict is clearly stale and insubstantial.

As the Eleventh Circuit explained in its thoroughly researched and thoughtfully expressed opinion:

> The *Rosman* analysis was flawed, however, because it failed to consider the French legal meaning of the language in Article 17. The court noted that there was "absolutely no dispute over the proper translation of the liability provisions of the Convention," . . . and that French law therefore was irrelevant in interpreting the Convention once a proper translation was agreed upon. . . .In light of the Supreme Court's holding in [*Air France v.*] *Saks* that the French legal meaning must govern our interpretation of Warsaw, and in light of the considerable negative commentary of *Rosman's* approach, we must reject the *Rosman* analysis. . . .
>
> . . . .
>
> There is a more fundamental problem with the *Rosman* and *Burnett* analysis, the analysis that Eastern urges upon this court. In drawing a sharp distinction between injury caused by physical impact and purely mental injury, the courts in *Rosman* and *Burnett* have taken the common law's distinction between mental and physical injuries and imposed it on Article 17 of the Warsaw Convention, a creation of civil lawyers. . . .As demonstrated earlier in this opinion, there is no such distinction in French law or other civil law systems. We are convinced that *Rosman* and *Burnett* inappropriately imported the common law doctrine.

(App. A-24, A-28-29).

It is also noteworthy, we think, that *Rosman* is considered so flawed that at least one New York state trial court did not even feel obliged to follow it, and reached a contrary result by (correctly) construing the French text of the Convention. *Palagonia v. Trans World Airlines, Inc.*, 110 Misc.2d 478, 442 N.Y.S.2d 670 (S. Ct. 1978). *Rosman's* conclusion has also been uniformly rejected by every United States District Court sitting in New York which has considered the question: *Husserl v. Swiss Air Transport Co.*, 388 F. Supp. 1238 (S.D.N.Y. 1975); *Karfunkel v. Compagnie Nationale Air France*, 427 F. Supp. 971 (S.D.N.Y. 1977); *Borhum v. Pan American World Airways*, 19 Aviation Cases 18,236 (CCH), 1986 WL 2974 (S.D.N.Y. March 5, 1986). And all other courts which have considered the question since 1974, including the Eleventh Circuit in the instant case, have reached the same conclusion: *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462 (11th Cir. 1989); *Eastern Airlines, Inc. v. King*, 536 So.2d 1023 (Fla. 1990); *Krystal v. British Overseas Airways Corp.*, 403 F. Supp. 1322 (C.D. Cal. 1975).

In short, the first two decisions on the issue have now been thoroughly discredited over the last 15 years by seven straight decisions to the contrary, and it seems highly unlikely that those early decisions will ever be followed again. Perhaps this Court's intervention might be appropriate if another federal court of appeals should choose to disagree with the Eleventh Circuit in the future; at the present time, however, no good reason suggests itself why this Court should grant certiorari review of the only decision ever rendered on the question by a federal appellate court.

2. The Eleventh Circuit's decision is correct.

Eastern also argues that the Eleventh Circuit's decision "departs from this Court's rules for the proper construction of the Warsaw Convention", and that the English phrase "bodily injury" simply must incorporate the common law's "impact rule" – and that is essentially all that it argues concerning the merits. In our judgment, the Eleventh Circuit followed "this Court's rules for the proper construction of the Warsaw Convention" to the letter, and it is Eastern which has missed the point here.

According to *Air France v. Saks*, 470 U.S. 392 (1985), it is the official French text of the Warsaw Convention which is controlling, not the unofficial English translation; and words and phrases must therefore be given their "French legal meaning" (470 U.S. at 399), rather than some other meaning which might be evoked by the words used in the English translation. The relevant question here is therefore the meaning of the phrase "lésion corporelle" in French civil law, not the meaning of the phrase "bodily injury" in American civil law – and that, of course, is exactly the task which the Eleventh Circuit undertook in the decision sought to be reviewed. In discharging that responsibility, the court held simply that French civil law permits recovery for any damage, whether mental or physical; the French legal meaning of "lésion corporelle" is "personal injury", rather than "bodily injury"; and the "impact rule" which Eastern urges as a limitation upon the phrase is an invention of the common law (which has now been relaxed or overruled in almost every jurisdiction) which has no counterpart in French civil law.

Eastern has not even bothered to quarrel with the Eleventh Circuit's determination of the "French legal meaning" of the phrase "lésion corporelle". All that it has argued is that the English phrase "bodily injury" ought to be construed to incorporate the common law's "impact rule" in order to protect international air carriers from lawsuits arising out of accidents causing only mental distress. Since the "impact rule" itself has been relaxed or overruled almost everywhere, the argument has little to commend it even under the common law; but quite apart from that fact, the argument is one which this Court simply cannot entertain after *Air France v. Saks, supra*. Before an error can be demonstrated in the Eleventh Circuit's decision, Eastern must demonstrate that the court misread the French civil law.

Since Eastern has not even bothered to suggest such an error in its petition, it ought to be clear that it cannot make such a demonstration on the merits – and no good reason suggests itself why this Court should grant review simply to repeat what it said five years ago in *Air France v. Saks*. In addition, of course, Eastern's concern over liability can be alleviated (indeed, eliminated) simply by ensuring that its own fleet's engines are properly maintained – which is reason enough for this Court to leave the desirable deterrent inherent in the Eleventh Circuit's reading of Article 17 squarely in place.

3. The "additional question" suggested by Eastern is entirely moot.

The concluding section of Eastern's argument suggests that, if certiorari is granted, the Court "may wish to

address" the additional question raised by the Eleventh Circuit's disposition of the preemption issue. As we explained in the concluding paragraph of our statement of the case, and as the Eleventh Circuit expressly anticipated in the decision itself, the Florida Supreme Court's determination that the "impact rule" is alive and well (in Florida, at least) renders this issue entirely moot at this point in the proceedings. We therefore respectfully submit that, even if the Court wished to address the question, the question is not presented and therefore cannot be decided.

CONCLUSION

For these reasons, we respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 89-1598

In the Supreme Court of the United States

OCTOBER TERM, 1989

EASTERN AIRLINES, INC.

Petitioner,

versus

ROSE MARIE FLOYD and
TERRY FLOYD, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

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EASTERN AIRLINES, INC.

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ROSE MARIE FLOYD and
TERRY FLOYD, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

Respondents concede that the decisions cited by Eastern are in conflict. Instead of trying to distinguish the cases, Respondents argue that the decisions are "stale" and

they disingenuously suggest that this Court await some future claimants' case to determine whether the issue was correctly decided by the Eleventh Circuit. In fact, the decisions in *Rosman v. Trans World Airlines, Inc.*, 314 N.E.2d 848 (N.Y. 1974) and *Burnett v. Trans World Airlines, Inc.*, 368 F.Supp. 1152 (D.N.M. 1973), are not so "stale" and "insignificant" that they are no longer persuasive. The trial court below found these decisions persuasive in holding that Article 17 of the Warsaw Convention did not permit recovery for pure emotional injury. The Eleventh Circuit reversed, relying in part on cases decided shortly thereafter. *See: Karfunkel v. Compagnie Nationale Air France*, 427 F.Supp. 971 (S.D. N.Y. 1977); *Husserl v. Swiss Air Transport Company*, 388 F.Supp. 1238 (S.D. N.Y. 1975); *Krystal v. British Overseas Airways, Corp.*, 403 F.Supp. 1322 (C.D. Cal. 1975). Petitioner can see no trend in the cases that settles this important issue. If the decisions in *Rosman* and *Burnett* are stale, so too are the contemporary decisions relied upon by the Eleventh Circuit.

Nor is Eastern advocating, as Respondents state, that this Court adopt an "impact rule" for Warsaw Convention cases. In arguing that recovery under the Warsaw Convention be limited to bodily injuries or to emotional injuries manifesting themselves in physical symptoms, Eastern is advocating a prudent rule of liability, as intended by the Warsaw Convention's drafters. Although, as Respondents state, the "impact rule" has been relaxed, it has not been totally abandoned and recovery for negligent infliction of mental distress still, generally, requires some physical manifestation of psychic injury. *See, e.g., Brown v. Cadillac Motor Car Division*, 468 So.2d 903 (Fla. 1985); *Battalla v. State of New York*, 10 N.Y.2d 237, 219 N.Y.S.2d 34, 176 N.E.2d 729 (N.Y. 1961). Intervention by this Court is necessary because the decision below incorrectly decided issues of great importance to the airline industry.

THE ELEVENTH CIRCUIT'S DECISION INCORRECTLY DECIDED THAT ARTICLE 17 PERMITS RECOVERY FOR PURE EMOTIONAL INJURY.

The Respondents do not allege that they suffered any bodily injury or impact or that the fright or shock which they allegedly suffered during the subject flight manifested itself in any physical symptoms. Their contention that the drafters of Article 17 intended to permit recovery for alleged fright or shock not susceptible of medical proof is not supported by the Convention's text, drafting history or by the subsequent conduct of the contracting parties to the Convention.[1] Article 17 of the Warsaw Convention provides:

> Le transporteur est responsable du dommage survenu en cas de *mort, de blessure ou de toute autre lesion corporelle* subie par un voyageur lorsque l'accident qui a cause le dommage s'est produit a bord de l'aeronef ou au cours de toutes operations d'embarquement et de debarquement.

(Emphasis supplied).

The official American translation of Article 17 is:

> The carrier shall be liable for damage sustained in the event of the *death or wounding of a passenger or any other bodily injury suffered by a passenger,* if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

(Emphasis supplied).

The Eleventh Circuit concluded that the French legal meaning of "lesion corporelle" was better translated into the

---

[1]Pursuant to this Court's procedures, these arguments will be more fully explored in the brief on the merits.

English phrase "personal injury," and ascribed to the Convention's drafters the intent to include recovery for pure emotional injury.

In interpreting the Warsaw Convention, courts consider the French legal meaning of its terms not because "we are forever chained to French law, either as it existed when the treaty was written or in its present state of development," *Rosman, supra,* 314 N.E.2d at 853, but because it is our responsibility to "give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Air France v. Saks,* 470 U.S. 398, 399 (1985). The Eleventh Circuit's expansive construction of the French legal meaning of "lesion corporelle" places too great an emphasis on generalities of French law. Nothing in French law compels the conclusion that, in using the phrase "lesion corporelle," the drafters of the Warsaw Convention specifically intended to permit recovery for pure emotional injury. The phrase "lesion corporelle" is not a French legal term of art that identifies a particular item of damage under French law. Instead, French law distinguishes between material damage ("le dommage material") and moral damage ("le dommage moral"). Damage is "material" if it is measurable in terms of money. It generally includes property damage, lost profits, wages, support and out-of-pocket expenses. "Moral" damage is traditionally damage not considered measurable in terms of money. The term includes damage to a person's honor, as in the case of defamation, and also includes mental suffering occasioned by the death of a loved one and the pain and suffering occasioned by physical injuries to oneself. Amos and Walton's, *Introduction To French Law,* p. 209 (3d Ed. 1967) (hereinafter "Amos and Walton"). In Roman law, "corporal" injury, i.e., injury to health or life, was not considered susceptible of reparation in money. Marcel Plainol and George Ripert, *Treatise On The Civil Law,* p. 471 (11th Ed. 1939) (Louisiana State Law Institute Translation). However, such damage in civil law jurisdictions is permitted and is

occasionally identified separately as "corporal" damage. Amos and Walton, p. 209. The word "corporal" (or "corporelle"), therefore, can be used to identify and, in fact, can connote a type of damage separate and apart from moral damage. *Burnett, supra,* 368 F.Supp. at 1156, citing, *Juglart, Traite Elementaire de Droit Aerien,* 330 (1952) (De vries translation) (to permit recovery for mental injuries, Article 17 would have to be amended to read "lesion corporelle ou mentale.") Therefore, no specific intent by the Warsaw Convention's drafters can be discerned that "lesion corporelle" affirmatively includes material, moral and corporal damages.

The Eleventh Circuit's analysis is primarily based on the work of a single commentator. *See:* Rene H. Mankiewicz, *The Liability Regime of the International Air Carrier,* p. 146 (1981). Other commentators do not agree. *See:* Andreas F. Lowenfeld, *Hijacking, Warsaw, and the Problem of Psychic Trauma,* 1 Syracuse Int'l L.J. 345 (1973) (drafters of Montreal Agreement did not intend to provide for recovery for pure emotional injury); Georgette Miller, *Liability in International Air Transport,* 112, 127-129 (1977) (use of word "lesion" has restricting effect on phrase "dommage corporelle.")[5] While ostensibly determining the French legal meaning of "lesion corporelle," the Eleventh Circuit has done nothing more than adopt the broadest possible interpretation of the word "lesion" and the broadest possible interpretation of the word "corporelle" and then translated them literally into the English phrase "personal injury." *Cf., Chan v. Korean Air Lines, Ltd.,* ____ U.S. ____, 109 S.Ct. 1676, 1683-1684, n.5 (1989) (Most natural meaning of Convention's text controls unless contradicted by clear drafting history).

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[5]*See also:* James M. Grippando, *Warsaw Convention-Federal Jurisdiction and Air Carrier Liability for Mental Injury: A Matter Of Limits,* 19 Geo. Wash. J. Int'l L. & Econ. 59, 82 (1985) (judicial creation of cause of action for emotional injury under Article 17 infringes upon congressional power to delimit federal jurisdiction).

An analysis of the *context* in which the treaty's written words are used does not support the Eleventh Circuit's conclusion. *Air France v. Saks*, 470 U.S. at 399. The contextual meaning of the critical words of Article 17, "en cas de mort, de blessure, ou de toute autre lesion corporelle" indicates that the drafters intended to limit recovery to bodily injury. "Blessure" indicates a wounding resulting from physical impact. *Floyd v. Eastern Airlines, Inc.*, reprinted in Appendix to Petition, A-1, at A. 17, citing, *Mankiewicz*, page 146. Thus, when the term "blessure" is equated with and is used to modify the phrase "lesion corporelle," it is clear that the drafters of the Convention meant to narrow Article 17's application to physical injuries. *Burnett, supra*, 368 F.Supp. at 1156.

In interpreting a treaty, it is proper to refer to the records of its drafting and negotiations. *Air France v. Saks*, 470 U.S. at 400. The first draft of Article 17 resulted from an International Conference in Paris in 1925. *Id.* at 401. Originally, the carrier was to be "liable for accidents, losses, breakdowns, and delays."[3] Because French law, at the time, permitted recovery for both physical and a liberal variety of mental injuries, the Conference appointed a group of air law experts who would produce a narrower provision acceptable to nations whose law was not so liberal. *Burnett, supra*, 368 F.Supp. at 1157. The text they submitted became the present Article 17 limiting recovery to bodily injuries.

The subsequent conduct of the contracting parties confirms that Article 17 of the Warsaw Convention limits recovery to bodily injury. The purpose of the Montreal Agreement, Agreement CAB 18900,[4] was to amend the Warsaw Convention by raising the carrier's liability limits to

[3]*Le transporteur est responsable des accidents, pertes, avaries et retards.* (1925 Paris) Conference Internationale de Droit Prive Aerien 87 (1936).

[4]The Montreal Agreement is reproduced in Appendix E.

$75,000 and to waive the carrier's "due care" defenses set forth under Article 20(1) of the Warsaw Convention. The Montreal Agreement was not intended to amend Article 17 in any way. If the Montreal Agreement is referred to, however, as evidence of the signatories' practical construction of Article 17, then it is obvious that the signatories did not construe Article 17 to include damages for emotional distress.

In regard to raising the liability limits and waiving the "due care" defenses, the Montreal Agreement provides that each carrier shall include the following language in its conditions of carriage and tariffs:

> (1) The limit of liability for each passenger for death, wounding, or other *bodily injury* shall be the sum of US $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a state where provision is made for separate award of legal fees and costs, the limit shall be the sum of US $58,000 exclusive of legal fees and costs.
>
> (2) The Carrier shall not, with respect to any claim arising out of the death, wounding, or other *bodily injury* of a passenger, avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by said Protocol.
>
> Nothing herein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has wilfully caused damage which resulted in death, wounding, or other *bodily injury* of a passenger. [Emphasis supplied]. (App. E-1, E-2).

The Montreal Agreement further provided that it was to be filed with the Civil Aeronautics Board of the United States for approval pursuant to Section 412 of the Federal Aviation Act of 1958. The CAB's order approving the

Montreal Agreement refers to "liability for each passenger for death, wounding, or *bodily injury*," and to "any claim arising out of death, wounding, or other *bodily injury* of a passenger," and to "damage which results in death, wounding, or other *bodily injury* of a passenger." (App. E5-7). (Emphasis supplied).

Clearly, the "practical construction" of the phrase "en cas de mort, de blessure ou de toute autre lesion corporelle" adopted by the airlines which signed the Montreal Agreement, and by the Civil Aeronautics Board when it approved the agreement, was "death, wounding or other bodily injury."

The Eleventh Circuit's conclusion that Article 17 permits recovery for pure emotional injury is not supported by the Warsaw Convention's text, drafting history or subsequent conduct of the contracting parties.

CONCLUSION

Certiorari should be granted to resolve the conflict concerning the construction of the Convention by answering this fundamental question relating to carrier liability.

Respectfully submitted,

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Appendix

INDEX TO APPENDICES

APPENDCES A-D are contained in the Petition for Writ of Certiorari.

APPENDIX E:

APPENDIX E

Agreement CAB 18900

CAB Form 263
(Rev. 1-76)

AGREEMENT

The undersigned carriers (hereinafter referred to as "the Carriers") hereby agree as follows:

1. Each of the Carriers shall, effective May 16, 1966, include the following in its conditions of carriage, including tariffs embodying conditions of carriage filed by it with any government:

"The Carrier shall avail itself of the limitation of liability provided in the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw October 12th, 1929, or provided in the said Convention as amended by the Protocol signed at The Hague September 28th, 1955. However, in accordance with Article 22(1) of said Convention, or said Convention as amended by said Protocol, the Carrier agrees that, as to all international transportation by the Carrier as defined in the said Convention or said Convention as amended by said Protocol, which, according to the Contract of Carriage, includes a point in the United States of America as a point of origin, point of destination, or agreed stopping place

(1) The limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of US $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US $58,000 exclusive of legal fees and costs.

(2) The Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by said Protocol.

Nothing herein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has wilfully caused damage which resulted in death, wounding, or other bodily injury of a passenger."

2. Each Carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention, or the Convention as amended by the Hague Protocol, and by the special contract described in paragraph 1, the following notice, which shall be printed in type at least as large as 10 point modern type and in ink contrasting with the stock on (i) each ticket; (ii) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (iii) on the ticket envelope:

"ADVICE TO INTERNATIONAL PASSENGER ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of [certain]* [(name of carrier) and certain other] carriers parties to such special contracts for death of or

* Either alternative may be used.

personal injury to passengers is limited in most cases to proven damages not to exceed US $75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately US $10,000 or US $20,000.

The names of Carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your airline or insurance company representative."

3. This Agreement shall be filed with the Civil Aeronautics Board of the United States for approval pursuant to Section 412 of the Federal Aviation Act of 1958, as amended, and filed with other governments as required. The Agreement shall become effective upon approval by said Board pursuant to said Section 412.

4. This Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any Carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with said Civil Aeronautics Board.

5. Any Carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to said Civil Aeronautics Board and the other Carriers parties to the Agreement.

31 Fed. Reg. 7302 (1966)

[Docket No. 17325; Order No. E-23680]

LIABILITY LIMITATIONS OF WARSAW CONVENTION AND HAGUE PROTOCOL

ORDER APPROVING AGREEMENT

Adopted by the Civil Aeronautics Board at its office in Washington, D.C., on the 13th day of May, 1966.

The Convention for the Unification of Certain Rules Relating to International Transportation by Air, generally known as the Warsaw Convention, creates a uniform body of law with respect to the rights and responsibilities of passengers, shippers, and air carriers in international air transportation. The United States became a party to the Convention in 1934, and eventually over 90 countries likewise became parties to the Convention. [The Convention was amended by the Protocol signed at Hague in 1955 which has never been ratified by the United States. The Convention (subject to certain provisions) limits carriers' liability for death or injury to passengers in international transportation to 125,000 gold francs, or approximately $8,300. The Protocol, subject to certain provisions, provides for liability limitations of approximately $16,600.] On Novembar 15, 1965, the U.S. Government gave notice of denunciation of the Convention, emphasizing that such action was solely because of the Convention's low limits of liability for personal injury or death to passengers. Pursuant to Article 39 of the Convention this notice would become effective upon 6 months' notice, in this case, May 15, 1966. Subsequently, the International Air Transport Association (IATA) made efforts to effect an arrangement among air carriers, foreign air carriers, and other carriers (including carriers not members of IATA) providing the major portions of international air carriage to and from the United States to increase the limitations of liability now applicable to claims for personal injury and death under the Convention and the

Protocol. The purpose of such action is to provide a basis upon which the United States could withdraw its notice of denunciation.

The arrangement proposed has been embodied in an agreement (Agreement CAB 18900) between various air carriers, foreign air carriers, and other carriers which has been filed with the Board pursuant to section 412(a) of the Federal Aviation Act of 1958 and Part 261 of the Board's economic regulations and assigned the above-designated CAB number.

By this agreement, the parties thereto bind themselves to include in their tariffs, effective May 16, 1966, a special contract in accordance with Article 22(1) of the Convention or the Protocol providing for a limit of liability for each passenger for death, wounding, or other bodily injury of $75,000 inclusive of legal fees, and, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, a limit of $58,000 exclusive of legal fees and costs. These limitations shall be applicable to international transportation by the carrier as defined in the Convention or Protocol which includes a point in the United States as a point of origin, point of destination, or agreed stopping place. The parties further agree to provide in their tariffs that the Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of the Convention or the Convention as amended by the Protocol. The tariff provisions would stipulate, however, that nothing therein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has willfully caused damage which results in death, wounding, or other bodily injury of a passenger.

The carriers by the agreement further stipulate that they will, at time of delivery of the tickets, furnish to each passenger governed by the Convention or the Protocol and

by the special contract described above, a notice in 10 point type advising international passengers of the limitations of liability established by the Convention or the Protocol, or the higher liability agreed to by the special contracts pursuant to the Convention or Protocol as described above. The agreement is to become effective upon approval by this Board, and any carrier may become a party to it by signing a counterpart thereof and deposing it with the Board. Withdrawal from the agreement may be effected by giving 12 months' written notice to the Board and the other Carrier parties thereto.

As indicated, the decision of the U.S. Government to serve notice to denounce the Convention was predicated upon the low liability limits therein for personal injury and death. The Government announced, however, that it would be prepared to withdraw the Notice of Denunciation if, prior to its effective date, there is a reasonable prospect for international agreement on limits of liability for international transportation in the area of $100,000 per passenger or on uniform rules without any limit of liability, and if pending such international agreement there is a provisional arrangement among the principal international air carriers providing for liability up to $75,000 per passenger.

Steps have been taken by the signing carriers to have tariffs become effective May 16, 1966, upon approval of this agreement, which will increase by special contract their liability for personal injury or death as described herein. The signatory carriers provide by far the greater portion of international transportation to, from, and within the United States. The agreement will result in a salutory increase in the protection given to passengers from the increased liability amounts and the waiver of defenses under Article 20(1) of the Convention or Protocol. The U.S. Government has concluded that such arrangements warrant withdrawal of the Notice of Denunciation of the Warsaw Convention.

Implementation of the agreement will permit continued adherence to the Convention with the benefits to be derived therefrom, but without the imposition of the low liability limits therein contained upon most international travel involving travel to or from the United States. The stipulation that no tariff provision shall be deemed to affect the rights and liabilities of the carrier with regard to any claim brought by, on behalf of, or in respect of any person who has willfully caused damage which results in death, wounding or other bodily injury of a passenger operates to diminish any incentive for sabotage.

Upon consideration of the agreement, and of matters relating thereto of which the Board takes notice, the Board does not find that that agreement is adverse to the public interest or in violation of the Act and it will be approved.

Accordingly, pursuant to the provisions of the Federal Aviation Act of 1958 and particularly sections 102,204(a) and 412 thereof:

If is ordered, That: 1. Agreement CAB 18900 is approved.

This order will be published in the FEDERAL REGISTER.

By the Civil Aeronautics Board.

[SEAL] HAROLD R. SANERSON,
Secretary.

[F.R. Doc. 66-5494; Filed, May 18, 1966 8:49 a.m.]

No. 89-1598

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

EASTERN AIRLINES, INC.,
Petitioner,

v.

ROSE MARIE FLOYD and TERRY FLOYD, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED APRIL 10, 1990
CERTIORARI GRANTED JUNE 4, 1990

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[1] The opinions of the Eleventh Circuit Court of Appeals and the United States District Court for the Southern District of Florida are reprinted in the appendix to the petition for writ of certiorari at Pet. App. A and Pet. App. B, respectively, and have not been reproduced here. Likewise, the order of the Eleventh Circuit Court of Appeals denying rehearing, is reprinted in the appendix to the petition at Pet. App. D, and is not reproduced here.

[2] This case comprises twenty-five actions which were jointly considered by the district court and court of appeals. The parties stipulated during the trial court proceedings that the pleadings in the *Floyd* case, which were included in the record excerpts before the Eleventh Circuit Court of Appeals, are representative of all of the plaintiffs' complaints. Accordingly, the operative complaint and answer are reproduced for this Court's review.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MDL Docket No. 575

IN RE: EASTERN AIRLINES ENGINE FAILURE,
MIAMI INTERNATIONAL AIRPORT ON MAY 5, 1983

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Filings-Proceedings
08/05/83	Eastern's Petition for Removal from the Eleventh Circuit Court in and for Dade County, Florida including Plaintiffs' Original Complaint filed.
08/12/83	Eastern's original Answer filed.
06/15/84	Plaintiffs' Amended Complaint filed.
06/19/84	Eastern's Answer to Amended Complaint filed.
04/18/85	Eastern's Motion for Judgment on the Pleadings and Memorandum of Law filed.
06/03/85	Plaintiffs' Memorandum of Law Opposing Eastern's Motion for Judgment on the Pleadings filed.
07/10/85	Eastern's Reply Memorandum in Support of its Motion for Judgment on the Pleadings filed.
02/03/85	Memorandum Opinion and Order of United States District Court for Southern District of Florida, Dismissing Complaints, reported at 629 F.Supp. 307 (S.D. Fla. 1986) filed.
04/29/86	Order of United States District Court Denying Motions for Reconsideration filed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 86-5381

IN RE: EASTERN AIRLINES, INC., ENGINE FAILURE,
MIAMI INTERNATIONAL AIRPORT ON MAY 5, 1983

ROSE MARIE FLOYD and TERRY FLOYD, *et al.*,
Appellants,

vs.

EASTERN AIRLINES, INC.,
Appellee.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Filings-Proceedings
05/28/86	Plaintiffs' Notice of Appeal filed.
05/05/89	Opinion of the Court of Appeals for the Eleventh Circuit filed—reversed, reported at 872 F.2d 1462 (11th Cir. 1989).
01/11/90	Order of Court of Appeals for the Eleventh Circuit Denying Eastern's Petition for Rehearing and Suggestion of Rehearing En Banc filed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 83-1949-Civ-LCN

ROSE MARIE FLOYD and TERRY FLOYD, her husband,
Plaintiffs,

vs.

EASTERN AIRLINES, INC., a Delaware corporation,
licensed to do business in Dade County, Florida,
Defendant.

AMENDED COMPLAINT

Plaintiffs, ROSE MARIE FLOYD and TERRY FLOYD, her husband, sue defendant, EASTERN AIRLINES, INC. (EASTERN), and allege:

1. This is an action for damages for personal injuries to plaintiffs for amounts exceeding Five Thousand ($5,000.00) Dollars.

2. At all times material to this action, plaintiffs were and are residents of Dade County, Florida.

3. At all times material to this action, EASTERN was and is a Delaware corporation, licensed to do business in Dade County, Florida.

4. At all times material to this action, EASTERN was and is a common carrier of passengers for hire and engaged in the operation of a fleet of aircraft in the business of air transportation of the public, and thus owed the highest duty of care to its passengers.

5. At all times material to this action, EASTERN, acting through its agents, servants or employees in the course or scope of their agency, service, or employment,

controlled, maintained and operated the aircraft involved in the incident out of which this litigation arises.

COUNT I

EASTERN'S BREACH OF CONTRACT TO USE HIGHEST DEGREE OF CARE

6. On or before May 5, 1983, plaintiff ROSE MARIE FLOYD purchased or caused to be purchased from EASTERN, for valuable consideration, a ticket to transport her from Miami International Airport in Dade County, Florida, to Nassau, Bahamas, and at such time and place entered into a contract with EASTERN for safe transportation.

7. At all times material to this action, the relationship of passenger and common carrier for hire existed between EASTERN and ROSE MARIE FLOYD.

8. The ticket purchased from EASTERN was the standard and customary ticket of transportation sold to passengers for this particular flight; a copy of the ticket or contract is attached to this complaint.

9. All conditions precedent to the relief demanded herein have been performed or have occurred.

10. Pursuant to said contract for transportation, ROSE MARIE FLOYD, on or about May 5, 1983, boarded Eastern flight No. 855, bound for Nassau, Bahamas out of Miami International Airport; shortly after take off, one of the aircraft's engines failed, and the plane turned around for return and landing in Miami, although Nassau was then closer. After turning around, the aircraft's other two engines also failed.

11. The crew and passengers were prepared for ditching of the aircraft as it lost altitude because of the failure of the engines. Finally, after an extended period of flight without any engines whatsoever, the crew was able

to restart one engine, under whose sole power the plane ultimately landed at Miami International Airport.

12. Pursuant to its contract with ROSE MARIE FLOYD, EASTERN promised and agreed to exercise the highest degree of care in order to transport ROSE MARIE FLOYD to her destination, but Eastern breached said contract and failed to exercise the highest degree of care in transporting ROSE MARIE FLOYD to her destination, in, among other things:

a. failing to properly, adequately and safely service and maintain said flight no. 855 by failing to install oil seals or "O-rings" in the engines;

b. failing to properly, adequately and safely inspect said flight no. 855 and thus failing to discover the absence of the essential O-rings;

c. failing to advise, train or supervise its agents, employees, servants or representatives in the reasonable and proper methods of inspection, maintenance and service of aircraft;

d. operating an aircraft which EASTERN knew or by the exercise of reasonable diligence should have known had been improperly maintained and serviced and was not fit for flight;

e. failing to maintain the highest standard of care and safety required under the Federal Aviation Act, by a common carrier for hire.

13. As a direct and proximate result of the breach by EASTERN, ROSE MARIE FLOYD suffered severe and permanent mental pain and anguish, fright, distress, and inability to lead a normal life. ROSE MARIE FLOYD further has incurred or will incur medical expenses and lost earnings and earning capacity.

WHEREFORE, plaintiff, ROSE MARIE FLOYD, sues defendant, EASTERN AIRLINES, INC., for compensatory damages in excess of the jurisdictional limits of this

Court, together with costs and interest and demands a trial by jury of all issues herein triable as of right by a jury.

COUNT II

EASTERN'S NEGLIGENCE

14. Plaintiff ROSE MARIE FLOYD, by reference, reiterates and realleges paragraphs 1-13 above, and further alleges:

15. On or about May 5, 1983, EASTERN was guilty of each and all of, but not limited to, the following negligent acts of omission or commission:

a. failure to properly, adequately and safely service and maintain said flight no. 855 by failing to install oil seals or "O-rings" in the engines;

b. failure to properly, adequately and safely inspect said flight no. 855 and thus failing to discover the absence of the essential O-rings;

c. failure to advise, train or supervise its agents, employees, servants or representatives in the reasonable and proper methods of inspection, maintenance and service of aircraft;

d. operation of an aircraft which EASTERN knew or by the exercise of reasonable diligence should have known had been improperly maintained and serviced and was unfit for flight;

e. failure to maintain the highest standard of care and safety required under the Federal Aviation Act, by a common carrier for hire.

16. As a direct and proximate result of the negligence of EASTERN, ROSE MARIE FLOYD suffered severe and permanent mental pain and anguish, fright, distress, and inability to lead a normal life. ROSE MARIE FLOYD further has incurred or will incur medical expenses and lost earnings and earning capacity.

WHEREFORE, plaintiff, ROSE MARIE FLOYD, sues defendant, EASTERN AIRLINES, INC., for compensatory damages in excess of the jurisdictional limits of this Court, together with costs and interest and demands a trial by jury of all issues herein triable as of right by a jury.

COUNT III

EASTERN'S ENTIRE WANT OF CARE

17. Plaintiff ROSE MARIE FLOYD, by reference, reiterates and realleges paragraphs 1-16 above and further alleges:

18. EASTERN's acts in failing to properly inspect, maintain and operate its aircraft on flight no. 855 on May 5, 1983, constituted an entire want of care or attention to its duty and showed great indifference to the persons, property and rights of the plaintiff. More particularly, EASTERN's records reveal at least one dozen prior instances of engine failures due to missing O-rings, and yet Eastern failed to institute appropriate procedures to cure this maintenance problem despite such knowledge.

19. EASTERN's entire want of care or attention to duty and great indifference to the persons, property and rights of the plaintiff reasonably implies such wantonness, willfulness, and malice as would justify punitive damages.

WHEREFORE, plaintiff, ROSE MARIE FLOYD, sues defendant, EASTERN AIRLINES, INC., for compensatory and punitive damages in excess of the jurisdictional limits of this Court, together with costs and interests and demands trial by jury of all issues herein triable as of right by a jury.

COUNT IV

CLAIM UNDER WARSAW CONVENTION

20. Plaintiff, ROSE MARIE FLOYD, by reference, reiterates and realleges paragraphs 1-19 above and further alleges:

21. This is an action for damages pursuant to the Warsaw Convention, a federal treaty (49 Stat. 3000).

22. Pursuant to the Convention, defendant owed a duty of care to the plaintiffs which duty, by reason of the negligent or willful misconduct as aforesaid, was breached, proximately resulting in damages to plaintiffs.

23. The Convention creates, by its terms and fair implications therefrom, a cause of action under federal law, independent and apart from any claims plaintiffs may have pursuant to state law.

WHEREFORE, plaintiff, ROSE MARIE FLOYD, sues defendant, EASTERN AIRLINES, INC., for compensatory and punitive damages in excess of the jurisdictional limits of this Court, together with costs and interests and demands trial by jury of all issues herein triable as of right by a jury.

COUNT V

LOSS OF CONSORTIUM

24. Plaintiff TERRY FLOYD, by reference, reiterates and realleges paragraphs 1-23 above and further alleges:

25. As a direct and proximate result of EASTERN's breach of contract, negligence, and entire want of care, plaintiff TERRY FLOYD has lost the society, services and consortium of his wife, plaintiff ROSE MARIE FLOYD, and such loss is permanent.

WHEREFORE, plaintiff TERRY FLOYD sues defendant, EASTERN AIRLINES, INC., for compensatory and punitive damages in excess of the jurisdictional limits of

this court, together with costs and interests and demands trial by jury of all issues herein triable as of right by a jury.

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 15 day of June, 1984, to: LAURA J. PEARSON, ESQ., Thornton, David & Murray, P.A., Suite 210, Ingraham Building, 25 S.E. Second Avenue, Miami, Florida 33131.

Respectfully submitted,

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- and -

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By: /s/ Michael S. Olin
MICHAEL S. OLIN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 83-1949-CIV-LCN

ROSE MARIE FLOYD and TERRY FLOYD, her husband,
Plaintiffs,

vs.

EASTERN AIR LINES, INC., a Delaware corporation, licensed to do business in Dade County, Florida,
Defendant.

ANSWER TO AMENDED COMPLAINT

The Defendant, EASTERN AIR LINES, INC., hereinafter referred to as ("EASTERN") answers Plaintiffs' Amended Complaint as follows:

FIRST DEFENSE—RESPONSE
TO COMPLAINT ALLEGATIONS

1. All allegations of the Complaint, except those hereinafter expressly admitted, are denied.

2. Without knowledge.

3. Admitted.

4. Admitted.

5. Admitted.

AS TO COUNT I

6. Admitted.

7. Admitted.

8. Admitted.[1]

[1] The complete ticket is attached to other pleadings.

9. Denied.

10. Admitted.

11. Admitted.

12. In answer to Paragraph 12 EASTERN admits existence of a contract with Plaintiff in the form of a passenger ticket and states that the terms and provisions thereof, including terms and provisions adopted by reference, speak for themselves. Eastern denies that it breached any term or provision of the contract and denies that it failed to exercise the degree of care required by the contract and applicable law. All subparagraphs of Paragraph 12 are denied.

13. Denied.

AS TO COUNT II

14. EASTERN adopts by reference Paragraphs 1 through 13 of this Answer.

15. EASTERN denies Paragraph 15, including all subparagraphs contained therein.

16. Denied.

AS TO COUNT III

17. EASTERN adopts by reference Paragraphs 1 through 16 of this Answer.

18. Denied.

19. Denied.

AS TO COUNT IV

20. EASTERN adopts by reference Paragraphs 1 through 19 of this Answer.

21. Admitted.

22. Denied, subject to Paragraphs 30, 31 and 32 of this Answer.

23. Denied, subject to Paragraphs 30, 31 and 32 of this Answer.

AS TO COUNT V

24. EASTERN adopts by reference Paragraphs 1 through 23 of this Answer.

25. Denied.

SECOND DEFENSE—AS TO COUNT I

26. Count I of the Complaint fails to state a claim upon which relief can be granted because the damages alleged for fright, mental anguish and the like were not in contemplation of the contracting parties as a probable result of the contract breach; or, in the alternative, the contract alleged is merely inducement and absent allegations of a physical impact experienced by Plaintiff, there can be no recovery under this Court.

THIRD DEFENSE—AS TO COUNT II

27. Count II of the Complaint fails to state a claim upon which relief can be granted because compensatory damages cannot be recovered for fright, mental anguish and the like absent allegations of a physical impact experienced by Plaintiff or allegations of facts, not conclusions, showing wilfull, wanton and malicious conduct.

FOURTH DEFENSE—AS TO COUNT III

28. Count III of the Complaint fails to state a claim upon which relief can be granted because, save legal conclusions asserted, there are no facts alleged showing willful, wanton or malicious conduct on the part of Defendant to support recovery of punitive damages.

FIFTH DEFENSE—AS TO COUNT V

29. Count V of the Complaint fails to state a valid claim for loss of consortium because loss of consortium is a derivative claim and the Complaint wholly fails to state an underlying cause of action upon which such derivative claim can be based.

SIXTH DEFENSE—AS TO ALL COUNTS

30. The air transportation involved, including the incident alleged, occurred on international transportation and is subject to and controlled by the Warsaw Convention.[2]

31. Pursuant to Warsaw, EASTERN's liability is confined to "bodily injury" suffered by a passenger if caused by an "accident" on board the aircraft and since (a) no "accident" occurred, (b) no "bodily injury" was sustained by Plaintiff and (c) punitive damages are not recoverable under Warsaw, EASTERN has no liability to Plaintiffs herein.

SEVENTH DEFENSE—AS TO ALL COUNTS

32. Pursuant to Warsaw (as modified by the Montreal Interim Agreement) Plaintiffs' total damages, if any are recoverable, are limited to $75,000.00 U.S. per ticketed passenger.

EIGHTH DEFENSE—AS TO ALL COUNTS

33. Even though Plaintiffs are claiming under the Federal Aviation Act of 1958 and even though Warsaw governs the subject international transportation, Florida law applies and in the absence of a physical impact experienced by Plaintiff during the flight, Plaintiffs cannot recover the damages claimed in the Complaint.

WHEREFORE, having fully answered the Complaint, Defendant moves for judgment in its favor and recovery of its defense costs.

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 18 day of July, 1984

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[2] Warsaw or Warsaw Convention, as used in pleadings, means and includes the Montreal (Interim) Agreement. Warsaw is cited 49 Stat. 3000. Montreal is cited CAB Agreement 18900 approved by Order No. E-23680 May 13, 1966, 31 Fed. Reg. 7302.

to: Michael S. Olin, Esquire, Suite 1201, City National Bank Building, 25 W. Flagler Street, Miami, FL 33131 and Fuller & Feingold, P.A., 1111 Lincoln Road, Miami Beach, FL 33139.

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By: /s/ Laura J. Pearson
LAURA J. PEARSON

(5)

No. 89-1598

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

EASTERN AIRLINES, INC.,
Petitioner,

v.

ROSE MARIE FLOYD and TERRY FLOYD, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether, in view of the presumed liability under the Warsaw Convention for death, wounding or any other bodily injury, an air carrier is liable for fright, psychic injury or emotional distress absent objective bodily injury or absent any physical manifestation of injury?

LIST OF ALL PARTIES AND RULE 29.1 STATEMENT

The parties to the proceedings below were the petitioner Eastern Airlines, Inc. and the following plaintiffs below and respondents to this petition (listed as they appeared in the style of the case):

ROSE MARIE FLOYD and TERRY FLOYD, her husband, CONNIE GALE and MICHAEL GALE, her husband, MICHAEL GALE and CONNIE GALE, his wife, GLORIA PATTERSON, EDMOND PATTERSON, THOMAS J. NOLAN, ROBERT SCHARHAG, EUGENE H. CHAMP, FREDERICK W. HOEHLER IV, SALLY ANN COLLINS, MICHAEL R. DRAMIS, SANDY DIX and GARY DIX, her husband, DANA DIX, by and through her parents GARY DIX and SANDY DIX, as guardians and next friends, ALEXANDER DIX, by and through his parents GARY DIX and SANDY DIX, as guardians and next friends, GERRI ASH SEIF, SUSAN ROONEY and WILLIAM ROONEY, her husband, JANET JACOBS and BRUCE JACOBS, her husband, ALEXANDER EMBRY, SALIM KHOURY and DEBORAH KHOURY, his wife, BRUCE JACOBS and JANET JACOBS, his wife, MYRIAM CARRASCO (f/k/a MYRIAM RILEY), TERRY FLOYD and ROSE MARIE FLOYD, GARY DIX and SANDY DIX, his wife, SALIM KHOURY and DEBORAH KHOURY, his wife, GREGORY MANTZ, by and through his parents, NETTA MANTZ and Harold D. MANTZ, as guardians and next friends, NETTA MANTZ, HAROLD MANTZ, GREGORY D. MANTZ, by and through his father HAROLD D. MANTZ.

In response to Rule 29.1, Petitioner Eastern states that it is a subsidiary of Texas Air Corporation and that the following is a list of Eastern's subsidiaries: Airport Ground Services Corporation, Dorado Beach Development, Inc., Dorado Beach Estates, Inc., EAL, Inc., EAL Properties, Inc., Eastern Airlines Leasing, Inc., Eastern Airlines of Puerto Rico, Inc., Ionosphere Clubs, Inc., JCSS Corporation, Protective Services Corporation, Terminal Sales Company.

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ROSE MARIE FLOYD and TERRY FLOYD, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE PETITIONER

Petitioner, Eastern Airlines, Inc. ("Eastern"), respectfully submits this brief on the merits.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1-54) is reported at 872 F.2d 1462. The opinion of the district court (Pet. App. B-1-21) is reported at 629 F.Supp. 307.

JURISDICTION

The opinion of the court of appeals (Pet. App. A-1-2) was entered on May 5, 1989. A petition for rehearing with a petition for rehearing *en banc* was denied on January 11, 1990 (Pet. App. D-1-2). The Petition for Writ of Certiorari was filed on April 10, 1990 and

granted on June 4, 1990. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

TREATY PROVISION INVOLVED

The treaty provision involved is Article 17 of the Convention for the Unification of Certain Rules Relating To International Transportation By Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* 49 U.S.C. § 1502 note (1970) ("Warsaw Convention"). Article 17 is set forth below:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Warsaw Convention, Art. 17.

STATEMENT OF THE CASE

Respondents[1] were passengers on an Eastern flight from Miami, Florida to Nassau, Bahamas. (J.A. 4). Shortly after takeoff, one of the aircraft's three engines failed. The plane was turned around for a landing in Miami, and on the return, the aircraft's other two engines failed. (J.A. 4). As the aircraft lost altitude because of the engine failures, the passengers and crew were prepared for ditching. The cockpit crew subsequently restarted one of the engines, and the aircraft safely landed at Miami International Airport. (J.A. 4-5).

Respondents brought actions pursuant to the Warsaw Convention for damages alleging mental pain and anguish, fright, distress and inability to lead normal lives

[1] There were 25 consolidated cases in this action. Eastern will refer to all of the plaintiffs/respondents collectively as "Respondents."

as a result of the incident. The complaints did not allege that plaintiffs suffered any bodily or physical injury or any physical manifestations of psychic injury. (J.A. 3-9).

The Warsaw Convention. The Convention is a treaty governing international aviation to which more than 120 nations now adhere. The Convention's primary purposes are twofold: to establish a uniform body of rules to govern international aviation and to set limits on carrier liability. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984). The Convention applies to "*all* international transportation of persons, baggage, or goods performed by aircraft for hire." Warsaw Convention, Art. 1 (emphasis added).

The decision below broadly construed the Warsaw Convention to encompass recovery for fright, psychic injury or emotional distress unaccompanied by any "wounding . . . or any other bodily injury," and unaccompanied by physical manifestations of psychic injury. *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1475 (11th Cir. 1989), reprinted in Appendix to Petition, A-1 at A-22.

The Montreal Agreement. Due to the dissatisfaction in the United States with the Convention's low limits of liability,[2] the major international air carriers, at the urging of the United States State Department, met in Montreal to increase their liability limits. In the resulting Montreal Agreement,[3] the signatories agreed to include within their conditions of carriage and tariffs a provision raising the liability limit to $75,000 on international flights serving the United States. The parties

[2] The liability limit was fixed at 125,000 poincaré francs by the Convention. Warsaw Convention, Art. 22.

[3] The Montreal Agreement is officially titled: "Agreement Relating to Liability Limitations of the Warsaw Convention and The Hague Protocol," Agreement CAB 18900, 31 Fed. Reg. 7302 (1966), note following 49 U.S.C. § 1502. (Pet. Reply App. E).

further agreed to include a provision waiving the right to assert the "due care" defense of Article 20, "with respect to any claims arising out of the death, wounding or other bodily injury to a passenger . . . ." *See Day v. Trans World Airlines*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976).

The Montreal Agreement is not a treaty. It is a special contract pursuant to Article 22(1) of the Convention between the airline signatories and their passengers which *has the effect* of imposing liability on air carriers *without a showing of fault*. *Air France v. Saks*, 470 U.S. 392, 407 (1985).

The Proceedings Below. The actions commenced in state court and were removed pursuant to the federal court's treaty jurisdiction and consolidated. (Pet. App. B-13). Respondents' complaints contained state law counts for breach of contract, negligence, and entire want of care (or intentional tort). (J.A. 3-9). In the federal count, the complaint sought recovery pursuant to Article 17 of the Warsaw Convention. (J.A. 8). The complaints did not allege that any plaintiff sustained any physical or bodily injury or impact or that any plaintiff experienced any physical manifestation of psychic injury. Under Florida law, recovery for emotional distress caused by simple negligence requires allegations of discernible and demonstrable physical injury. *Brown v. Cadillac Motor Car Div.*, 468 So.2d 903 (Fla. 1985). Recovery for intentional infliction of emotional distress is precluded unless the conduct is found to be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency. . . ." *Metropolitan Life Ins. Co. v. McCarson*, 467 So.2d 277 (Fla. 1985); *accord*, *Eastern Airlines, Inc. v. King*, 557 So.2d 574, 576 (Fla. 1990), reprinted in Appendix to Petition, C-1-14. Therefore, Eastern moved for judgment on the pleadings based upon Respondents' failure

to state a claim for which relief could be granted under either Florida or federal law.[4] (J.A. 1).

The district court held that the allegations in the complaint failed to establish any intentional or willful misconduct on the part of Eastern in connection with its maintenance of the aircraft. (Pet. App. B-5-8). Therefore, because recovery for mental distress pursuant to the breach of contract count and one of the two tort counts was dependent upon a finding of independent willful misconduct, the district court held that the Respondents failed to state a cause of action under the state law counts. (Pet. App. B-2-8).[5] As to the Warsaw Convention count, the district court, relying on *Burnett v. Trans World Airlines, Inc.*, 368 F. Supp. 1152 (D. N.M. 1973), concluded that "mental anguish alone is not compensable under the Warsaw Convention." (Pet. App. B-13).

The Eleventh Circuit Court of Appeals reversed. (Pet. App. A). As to the state law counts, the court held that it was bound by the decision of a Florida appellate court in a related case arising from the same incident holding that the allegations against Eastern stated a cause of action under Florida law for intentional infliction of emotional distress.[6] (Pet. App. A-32). As to the Warsaw Convention count, it expressly rejected the analysis and

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[4] Generally, the cause of action for mental distress requires, *inter alia*, a showing of physical injury, physical manifestation of psychic injury or some intentional misconduct. Prosser and Keeton on *The Law of Torts* 60-65, 359-61 (W. Keeton 5th ed. 1984) (hereinafter *Prosser and Keeton*).

[5] Absent allegations of discernible and demonstrable physical injury, the plaintiffs did not state a cause of action for negligent infliction of emotional distress. (Pet. App. B-4-5).

[6] The decision in *Eastern Airlines, Inc. v. King* was subsequently reversed. (Pet. App. C). The Supreme Court of Florida held that Eastern's conduct herein does not rise to intentional or willful and wanton misconduct. (Pet. App. C-1-14).

conclusions of the New York Court of Appeals in *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385, 358 N.Y.S.2d 97, 314 N.E.2d 848 (1974) and the United States District Court of New Mexico in *Burnett*. (Pet. App. A-28). The Eleventh Circuit held that the "Convention provides recovery for pure emotional injuries unaccompanied by physical injury." (Pet. App. A-14). The court also held that a passenger could recover damages from an air carrier for pure emotional injury *in excess* of the $75,000 liability limits if the carrier acts with willful misconduct. (Pet. App. A-52).

SUMMARY OF ARGUMENT

1. Article 17 of the Warsaw Convention creates a presumption of air carrier liability but only for damage sustained "in the event" of "death," "wounding" or other "bodily injury." The Eleventh Circuit has construed "bodily injury" to mean mere fright, mental anguish or emotional distress absent bodily injury or absent physical manifestations of injury. At the time the Warsaw Convention was drafted, psychic trauma was not embraced within the term "bodily injury." *Rosman*, 34 N.Y.2d at 403, 358 N.Y.S.2d at 112, 314 N.E.2d at 859 (Stevens, J., dissenting). Nor was the concept of pure mental injury encompassed within the French term "lésion corporelle."

In construing "bodily injury" to mean mere fright, mental anguish or emotional distress, the decision below effectively abandons the ordinary and natural meaning of the treaty's precise and unambiguous terms and impermissibly grafts upon Article 17 a judicially expanded category of compensable injuries not intended by the drafters of the Warsaw Convention.

2. In its attempt to arrive at a meaning of Article 17 which undermines its clear and unambiguous terms, the Eleventh Circuit concluded that the French legal

meaning of "lésion corporelle" was better translated into the English phrase "personal injury" and ascribed to the Convention's drafters the intent to include recovery for pure emotional injury. However, the decision below violates the intent and expectations of the Convention's drafters in disregarding the unequivocal language and drafting history of Article 17. The Convention's framers discussed air carrier liability strictly in terms of physical, bodily injuries. Moreover, the Eleventh Circuit has incorporated principles of French damage law into the Convention in conflict with the framers' express intent to establish international, not parochial, legal standards.

Furthermore, the Eleventh Circuit's conclusion that the requirement of "lésion corporelle" is satisfied by mental injury alone is not supported by the weight of authority. Leading aviation law experts at the time that the Convention was drafted have recognized that "lésion corporelle" is a precondition to an air carrier's liability under Article 17 and that an amendment of Article 17 is necessary before liability can be imposed for pure mental injury. Moreover, the word "lésion" is classically defined in French as an injury or alteration of a bodily organ or tissue. Therefore, the physical connotations of the term effectively restrict the meaning of "lésion corporelle," precluding the inclusion of pure mental injury within its terms.

An analysis of the context in which the treaty's words are used supports the conclusion that "lésion corporelle" is not satisfied by mental injury alone. "Lésion corporelle" occurs in the phrase "de mort, de blessure, ou de toute autre lésion corporelle." "Blessure" indicates a wounding resulting from physical impact. Therefore, the incorporation of the terms "mort" and "blessure" within "lésion corporelle" conclusively demonstrates that the drafters utilized the phrase solely in the physical sense.

The Eleventh Circuit's construction of Article 17 conflicts with the drafters' intent since the drafters declined to adopt a broad liabilty formulation and chose instead to require that damages flow from a "lésion corporelle" (from a "bodily injury"). Courts were wary of allowing such claims because of the ease in which mental disturbance is simulated. When the uncertainty of claims for pure psychic injury is contrasted with the Warsaw Convention's overall principle of allowing only a regulated burden to be borne by the air carriers, it becomes clear that the drafters did not intend to impose upon air carriers liability for fright, shock or other mental disturbances which are purely subjective and not often marked by any definite physical symptoms capable of clear medical proof.

3. Additionally, the Eleventh Circuit's construction of "lésion corporelle" to include mental injury conflicts with the intent of the drafters as evidenced by the subsequent conduct of the contracting parties, since, subsequent to the Convention's entry into force, the drafters have considered and consistently rejected proposals to expand the categories of compensable injuries to include pure mental injury. The decision's reliance upon the use of the words "personal injury" in the Guatemala City Protocol and the Montreal Agreement as indicative of the intent of the treaty's drafters is wholly misplaced. The record of the proceedings at Guatemala City is devoid of any evidence that the signatories intended a substantive change of Article 17 or a clarification of the original treaty framers' intent. Therefore, it is manifestly impossible to conclude that the change in terminology was a clarification of the original language. More importantly, the Guatemala City Protocol has not been ratified by any nation. Therefore, it is the terms of the Warsaw Convention, *as originally drafted*, which control Eastern's liability in the instant case.

Similarly erroneous is the Eleventh Circuit's conclusion that the use of the phrase "personal injury" interchangeably with "bodily injury" in the Montreal Agreement signifies a clarification of Article 17's language. The signatories to the Agreement did not intend to broaden their liability to claims for pure mental injury. The assumption at Montreal was that the air carrier's liability would be governed by the terms of the Convention itself.

4. The decision below expands an air carrier's liability in a United States court beyond that of its liability in the courts of other signatories to the Warsaw Convention. Scholars in both England and France have concluded that the application of Article 17's express terms by English and French courts would preclude claims for mere mental anguish and anxiety unaccompanied by bodily injury. Moreover, extending the reach of that Article to permit mere "fright" or "mental anguish" expands an air carrier's liability in United States courts beyond that of other signatory nations, even if Article 17 is broadly construed since neither French nor English law recognizes a cause of action for mere fright (under "lésion corporelle") or mere mental anguish.

5. If allowed to stand, the decision below will have a substantial impact on all international aviation. Under the Warsaw Convention and the Montreal Agreement an air carrier is presumptively and strictly liable for its passengers' accidental in-flight injuries. The decision below undermines the Convention's purposes of uniformity and predictability by imposing upon international air carriers strict liability for its passengers' subjective and undemonstrable injuries.

The decision below exposes air carriers to a potentially unlimited number of frivolous and unverifiable claims. Conceivably, every hypersensitive individual with a fear of flying could require an airline to pay on a

claim for the discomfort experienced on a flight beset by unavoidable turbulence.

6. Finally, this Court should determine that the Warsaw Convention exclusively governs claims for injuries sustained during international air transportation. A finding that the Warsaw Convention provides an exclusive cause of action would be consistent with the purpose of the Convention and the intent of the drafters to establish a uniform body of rules governing international air travel. Without such a finding, the goals of the Convention will be thwarted and the economic uncertainties of air travel will increase.

The Court should reverse the decision of the Eleventh Circuit pursuant to the unambiguous terms of the treaty and the clear intent of the framers.

ARGUMENT

I. IN PERMITTING RECOVERY FOR PURE MENTAL INJURY, THE DECISION BELOW IGNORES THE WARSAW CONVENTION'S REQUIREMENT THAT COMPENSABLE DAMAGES FLOW FROM A "BODILY INJURY"

The controversy focuses upon the proper construction of Article 17 of the Convention. The starting point in determining what injuries are compensable under the Warsaw system is the language of the Convention itself. *Chan v. Korean Air Lines, Ltd.*, —— *U.S.* ——, 109 S. Ct. 1676, 1683-84 and n.5 (1989). The language employed is the foremost guide to the drafters' intention. *United States v. Rutherford*, 442 U.S. 544, 551 (1979). Courts must be governed by the Warsaw Convention's text, as adopted by the many separate nations, and give effect to the most natural meaning of its clear and unambiguous terms. *Chan*, 109 S. Ct. at 1683-84 and n.5.

Article 17 creates a presumption of air carrier liability but only for damage sustained "in the event" of

"death," "wounding" or other "bodily injury." Article 17 states:

> The carrier shall be liable for damage sustained *in the event of* the *death* or *wounding* of a passenger or *any other bodily injury* suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Warsaw Convention, Art. 17 (emphasis added).

Since the official text of the Convention is in the French language, the relevant French text is quoted as follows:

> Le transporteur est responsable du dommage survenu *en cas de mort, de blessure ou de toute autre lésion corporelle* subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement et de débarquement.

49 Stat. 3000, *reprinted in* 49 U.S.C. § 1502 note.

The parties to the Warsaw Convention intended that international air cariers be liable for passenger injuries only if the requirements of Article 17 are met. *Saks*, 470 U.S. at 402 (Article 17 operates to qualify the liability of international air carriers). Unless the prerequisite event of a "death," "wounding" or "bodily injury" occurs, an air carrier is not liable. *See e.g., Saks*, 470 U.S. at 406 (air carrier not liable absent prerequisite event of an "accident"). At the time the Warsaw Convention was drafted, psychic trauma was not embraced within the term "bodily injury." *Rosman*, 34 N.Y.2d at 403, 358 N.Y.S.2d at 112, 314 N.E.2d at 859 (Stevens, J., dissenting). Nor was the concept of pure mental injury encompassed within the French "lésion corporelle." M. de Juglart, *Traité Elémentaire de Droit Aérien* 330 (1952) (hereinafter *de Juglart*).

Therefore, New York's highest court concluded that, under the Warsaw Convention, an air carrier is liable only for "palpable, objective bodily injuries, including those caused by . . . psychic trauma" but not for the trauma itself or for mere behavioral manifestations of psychic trauma. *Rosman*, 34 N.Y.2d at 400, 358 N.Y.S. 2d at 110, 314 N.E.2d at 857. In construing the words "bodily injury," the *Rosman* court stated:

> We deal with the term as used in an international agreement written almost 50 years ago, a term which even today would have little significance in the treaty as an adjective modifying "injury" except to import a distinction from "mental." In our view, therefore, the ordinary, natural meaning of "bodily injury" as used in article 17 connotes palpable, conspicuous physical injury, and excludes mental injury with no observable "bodily," as distinguished from "behavioral," manifestations.

34 N.Y.2d at 397, 358 N.Y.S.2d at 107, 314 N.E.2d at 855 (emphasis in the original).

In the instant case, Respondents do not allege that they suffered any bodily injury or that the emotional trauma which they allegedly suffered during the flight manifested itself in physical symptoms. (J.A. 3-9). In construing "bodily injury" to mean mere fright, mental anguish or emotional distress absent bodily injury or physical manifestations of injury, the decision below effectively abandons the ordinary and natural meaning of the treaty's precise and unambiguous terms and imposes upon the Warsaw Convention a meaning that was neither contemplated nor intended by its drafters.

In *Chan*, this Court declined to impose on the Warsaw Convention a requirement of adequate notice that was not provided for by the Convention's express terms. *Chan*, 109 S. Ct. at 1684. In so holding, this Court quoted Justice Story's admonition against judicial treaty-making:

> [T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this Court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind.

Chan, 109 S. Ct. at 1684, quoting, *The Amiable Isabella*, 6 Wheat. 1, 71 (1821).

The language of Article 17 unambiguously enumerates the types of injuries which are a precondition to an air carrier's liability under the Warsaw system. The decision below has disregarded the unequivocal language of the Warsaw Convention by expanding an air carrier's liability to damages which do not flow from the prerequisite event of a "bodily injury." As such, it has impermissibly grafted upon Article 17's express terms a judicially expanded category of compensable injuries not intended by the drafters of the Warsaw Convention.

II. THE DECISION BELOW VIOLATES THE INTENT AND EXPECTATIONS OF THE CONVENTION'S DRAFTERS IN DISREGARDING THE UNEQUIVOCAL LANGUAGE OF ARTICLE 17

In interpreting an international convention, the drafting history is consulted only to elucidate an ambiguous text and, even if unclear, the most natural meaning of the treaty's terms control unless contradicted by clear drafting history. *Chan*, 109 S. Ct. at 1683-84 and n.5. Neither the Convention's text nor the deliberations of its framers reflect any ambiguity concerning the liability provisions of Article 17. The decision below ignores the Warsaw Convention's terms, and has employed a strained

interpretation of the Convention's drafting history to obscure an unambiguous text.

A. The Eleventh Circuit's Construction Of Article 17 Conflicts With The Intent Of The Framers As Evidenced By The Warsaw Convention's Drafting History

In interpreting a treaty provision, it is proper to refer to the records of its drafting and negotiation. *Saks*, 470 U.S. at 400. The Eleventh Circuit attempts to justify its expansive construction of Article 17 by interpreting the framers' silence on the issue of damages as indicative of their tacit understanding that the Warsaw Convention would incorporate those damages for pure mental injury perceived to be broadly compensable under French law. (Pet. App. A-14, 16-18). Contrary to the Eleventh Circuit's conclusion, the deliberations of the delegates at the conference leading up to the Warsaw Convention evince the intent that only bodily injuries are compensable under the Warsaw system.

1. *The Decision Below Has Erroneously Incorporated French Law Into The Convention In Conflict With The Framers' Intent To Establish International, Not Parochial, Legal Standards*

There is no suggestion in the treaty's drafting history that French law was intended to govern the meaning of the Warsaw Convention's terms. *Rosman*, 34 N.Y.2d at 394, 358 N.Y.S.2d at 104, 314 N.E.2d at 853. The treaty that became the Warsaw Convention was initially drafted at the First International Conference on Private Aeronautical Law which took place in Paris in 1925. *Saks*, 470 U.S. at 401. The draft Convention was revised and adopted at a second conference which took place in Warsaw, Poland in 1929. The Convention's first and most obvious purpose was to establish internationally uniform liability rules and limits. *Franklin Mint*, 466 U.S. at 256-57. The Convention's drafters, therefore, strove for legal standards which could be

translated, harmonized and applied by the various nations represented at the conference. *See e.g., Minutes, Second International Conference on Private Aeronautical Law*, Oct. 4-12, 1929, Warsaw 59 (R. Horner & D. Legrez trans. 1975) (hereinafter *Minutes*) (addressing the need for clarification of phrase "intentional illicit act" for application by English courts). *See also Id.* at 60-62 (clarification of phrase "faute lourde"). The results were international, not parochial, legal standards that would "satisfy both peoples under English or Anglo-Saxon law and peoples under Continental laws." *Id.* at 208 (comments of Mr. Giannini). *See also Id.* at 212 (clarification of willful misconduct standard was a compromise between French and English standards). Article 17 does not, therefore, incorporate into the Warsaw Convention the damages law of any particular locale. Instead, it qualifies the preconditions to air carrier liability by requiring that the damages flow from the prerequisite ent of a "death," "wounding" or other "bodily injury."

2. *The Decision Below Has Erroneously Overlooked That The Convention's Framers Discussed Air Carrier Liability Strictly In Terms Of Physical Injuries*

In debating the various provisions of the Warsaw Convention, the drafters discussed the air carrier's liability strictly in terms of physical, "bodily injury." Henri De Vos of Belgium, the Reporter of the Warsaw Convention, in considering whether a fault theory or a risk-shifting theory of liability would be preferable, explicitly referred to the air carrier's liability in terms of "bodily injury":

> One has wondered if it would not be necessary to allow risk theory in this area as the basis for the system of liability for death and *bodily injury*.

Id. at 21 (emphasis added).

During the seventh session, Mr. Amedeo Giannini of Italy, in discussing the need to have separate articles for

passenger death, injury, loss of goods and delay, discussed the air carrier's liability strictly in terms of a physical injury:

> There were many amendments proposed and under these conditions the drafting committee envisaged the possibility of retaining the system of the CITEJA[7] preliminary draft . . . . But, given that there are entirely different liability cases: death or *wounding*, disappearance of goods, delay, we have deemed that it would be better to begin by setting out the causes of liability for persons, then for goods and baggage, and finally liability in the case of delay.

Id. at 205 (emphasis added).

In discussing the desirability of dividing Article 24 (addressing willful misconduct) into two separate articles, Mr. J. Wolterbeek-Muller of the Netherlands, in terms connoting unmistakable physical injury, stated:

> I propose to divide up this article and to make a special article with paragraphs 2 and 3. In the first paragraph, death and *wounding* are involved, while in the other paragraphs goods are involved. So that there be no confusion, I think it would be better to make two articles.

Id. at 212 (emphasis added).[8]

The Convention's framers discussed the liability provisions of Article 17 in terms of "bodily injury." The Eleventh Circuit's construction is not supported by the Convention's clear drafting history.

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[7] The CITEJA refers to the Comité Internationale Technique d'Experts Juridiques Aériens.

[8] In the French language version of the conference minutes, the delegates employed the words "blessure" (wounding) and "lésion corporelle" (bodily injury). II *Conférence Internationale de Droit Privé Aérien*, 4-12 octobre 1929, Varsovie 16, 52, 135, 139 (ICAO 1933).

3. *The Eleventh Circuit Has Erroneously Concluded That The Requirement Of "Lesion Corporelle" Is Satisfied By Mental Injury Alone*

The Eleventh Circuit's strained construction of "lésion corporelle" is not supported by the weight of authority. The leading French and European aviation law experts at the time that the Warsaw Convention was drafted have noted that the requirement of "lésion corporelle" is not satisfied by mental injury alone. G. Coquoz, *Le Droit Privé International Aérien* 122 (1938) (Convention's "lésion corporelle" should be amended to indicate that pure mental injury is compensable); *de Juglart*, *supra* p. 11, at 330 (recovery for pure mental injury should have been provided for in Article 17); K.M. Beaumont, *Need for Revision and Amplification of the Warsaw Convention*, 16 J. Air L. & Com. 395, 401-02 (1949) (drastic revision and amplification of Article 17 is required in order to clarify that pure mental injury is covered); G.R. Sullivan, *The Codification of Air Carrier Liability By International Convention*, 7 J. Air L. & Com. 1, 19 (1936) (doubting that Article 17 covers injury resulting from fright absent physical manifestations of injury). Even into the 1950's, French delegates to a 1951 conference considering revisions to the Warsaw Convention noted that the expression "lésion" presupposes a rupture of body tissue and is too narrow an expression to permit recovery for mental illness. ICAO Legal Committee, *Minutes and Documents of the Eighth Session, Madrid*, 11 *Sept.*—28 *Sept.*, 1951,—ICAO Doc. 7229-LC/133 at 270 (1951) (hereinafter *Madrid Minutes*) (comments of Mr. Garnault). *See* discussion, *infra* pp. 25-27.

In its attempt to arrive at a meaning of Article 17 which undermines its clear and unambiguous terms, the Eleventh Circuit concluded that the French legal meaning of "lésion corporelle" was better translated into the English phrase "personal injury," and ascribed to the Convention's drafters the intent to include recovery

for pure emotional injury.[9] However, nothing in French law compels the conclusion that, in using the phrase "lésion corporelle," the drafters of the Warsaw Convention specifically intended to permit recovery for pure emotional injury.

Initially, it should be noted that "lésion corporelle" does not formally identify a type of damage in French law. *Palagonia v. Trans World Airlines*, 110 Misc.2d 478, 442 N.Y.S.2d 670 (Sup. Ct. 1978). Instead, the basic distinction in French damage law is between "dommage matériel" and "dommage moral." "Dommage matériel" includes any economic loss suffered by the plaintiff, such as loss of wages, medical and funeral expenses or benefits. B. Nicholas, *French Law of Contract* 221-22 (1982) (hereinafter *Nicholas*); *Amos and Walton's Introduction to French Law* 209 (F.H. Lawson, A.E. Anton & L. N. Brown, 3d ed. 1967) (hereinafter *Amos and Walton*). "Dommage moral" includes all other forms of damage which do not cause an economic loss such as the right to privacy, damage to a person's honor (as in the case of defamation), mental suffering occasioned by the death of a loved one or the pain and suffering occasioned by physical injuries to oneself. M. Plainol and G. Ripert, 2 Treatise on the Civil Law, § 868A (Louisiana State Law Institute trans. 11th ed. 1939); *Amos and Walton*, *supra*, at 209; *Nicholas*, *supra*, at 221-22. The composite concept of "dommage corporel" is used to refer to both "matériel" and "moral" damages which may result from personal injury, *e.g.*, medical expenses, loss of wages, or pain and suffering. G. Miller, *Liability*

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[9] Since the Convention was drafted in French by continental jurists, Courts will *consider* the French legal meaning of the Warsaw Convention's terms, not because "we are forever chained to French law by the Convention, but because it is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Saks*, 470 U.S. at 399 (citations omitted) (emphasis added).

in International Air Transport 113 (1977) (hereinafter *Miller*).

The Eleventh Circuit erred in concluding that the phrase "lésion corporelle," by analogy to the French concept of "dommage corporelle," would extend to purely mental or emotional injury. (Pet. App. A-16, n.16).[10] This reasoning is fundamentally flawed because the incorporation of the French "dommage corporel" into the Convention is contrary to the international, nonparochial standards established by the Convention's framers. (*See* discussion, *supra* pp. 14-15). Moreover, "lésion corporelle" is *not* analogous to "dommage corporel."

The word "lésion" is classically defined in French as an injury or alteration of a bodily organ or tissue. Le Petit Robert, Dictionnaire de La Langue Française (1970) ("changement grave dans les caractères anatomique et histologiques d'un organe sous l'influence d'une maladie, d'un accident"),[11] *quoted in*, *Miller*, *supra*, at 127.[12] While the word "corporel" and the phrase "dommage corporel" may broadly reflect damages flowing from both bodily or psychic injury, "lésion" only connotes bodily injury. Moreover, because all of the pertinent

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[10] *See also Palagonia*, 110 Misc. 2d at 403, 442 N.Y.S.2d at 673-74.

[11] Severe change in the anatomical and histological character of an organ as the result of illness or injury.

[12] "Lésion" is similarly defined by other authorities as follows:

> An injury or wound to a bodily organ . . . . Lésion is the alteration, more or less profound, of an organ or tissue. Dictionnaire Encyclopédique Quillet (1938) ("Atteinte, blessure portée a un organe. . . . La lésion est l'altération plus ou moins profonde d'un organe ou d'un tissu.");
>
> Change in the structure of a tissue or bodily organ as the result of disease. Petit Larousse Illustré (1990) ("Modification de la structure d'un tissu, d'un organe sous l'influence d'une cause morbide . . . .");
>
> Bodily injuries. J. Baleyte, Dictionnaire Juridique (1977) ("Lésion corporelles").

definitions of the word "lésion" emphasize that a bodily organ is affected, the physical connotations of the term effectively restrict the meaning of "lésion corporelle," precluding the inclusion of pure mental injury within its terms. *Miller*, *supra* p. 19, at 126-28. The bodily or physical connotations of the word "lésion" are so acute that one cannot, for example, translate "lésion mentale" into "mental injury." At best, "lésion mentale" could be interpreted as a "poorly worded reference to an injury to the brain." *Id.*[13]

The requirement of "lésion corporelle" is, therefore, not satisfied by pure mental anguish or distress. That the drafters declined to use the phrase "dommage corporel," which does not draw a sharp distinction in French law between bodily and mental injury, and chose instead the phrase "lésion corporelle," which clearly contemplates only "bodily injury," conclusively establishes the drafters' intent that only the latter be compensable under the treaty's terms.

An analysis of the context in which the treaty's words are used supports this conclusion. *Saks*, 470 U.S. at 399. "Lèsion corporelle" occurs in the phrase "de mort, de blessure ou de toute autre *lésion corporelle*." The contextual meaning of the critical words of Article 17 indicates that the drafters intended to limit recovery to bodily injury. "Blessure" indicates a wounding resulting from physical impact. Pet. App. A-17 *citing* R. Mankiewicz, *The Liability Regime of the International Air Carrier* 146 (1981) (hereinafter *Mankiewicz*). Therefore, the incorporation of the terms "mort" (death) and "blessure" (wound) within "lésion corporelle" conclusively demonstrates that the drafters utilized the phrase solely in a

[13] Although the word "lésion" has an abstract meaning in French law, none of those applications affect the meaning in which lesion is used in Article 17. *Miller*, *supra* p. 19, at 128. An example of the utilization of "lésion" in an abstract or figurative sense is the "lésion" of a right such as the right to obtain a fair price in some contracts of sale. *Id.*

physical sense. *Rosman*, 34 N.Y.2d at 399, 358 N.Y.S.2d at 109, 314 N.E.2d at 856; *Burnett*, 368 F.Supp. at 1152; *Miller*, *supra* p. 19, at 128.

By redefining "lésion corporelle" to mean mere mental anguish or emotional injury, the decision below ignores a distinction rooted in treaty language which is the "foremost guide to the drafters' intent." *Rutherford*, 442 U.S. at 551.

4. *The Decision Below Conflicts With The Intent To Limit Liability As Evidenced By The Circumstances In Which The Treaty Was Drafted*

International agreements, such as the Warsaw Convention, "are to be read in light of the conditions and circumstances existing at the time they were entered into, with a view to effecting the objects and purposes of the states thereby contracting." *Rocca v. Thompson*, 223 U.S. 317, 331-32 (1912). To the extent that, at the time of the Convention's drafting, French law permitted recovery for 'matériel" and "moral" damages, this was directly attributable to the broad statutory language of Section 1382 of the Napoleonic Code, in effect in 1929, which provided:

> Any action whatsoever by a person causing damage to another obliges that person to repair the damage caused.

Code Civil [C. civ.] § 1382 (Fr.).[14]

Had the drafters of the Warsaw Convention, as the Eleventh Circuit suggests, intended to provide for as broad a variety of compensable damages as existed at the time in France under the Napoleonic Code, they well knew how to express the concept. The fact that they declined this broad formulation and chose instead to re-

[14] Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer.

quire that damages flow from a "lésion corporelle" indicates that the drafters intended to limit air carrier liability to "bodily injury." [15]

This conclusion is buttressed by the changes that Article 17 underwent in the Convention's drafting process. The first draft of the treaty that became the Warsaw Convention contained an article specifying: "The carrier is liable for accidents, losses, breakdowns, and delays. It is not liable if it can prove that it has taken reasonable measures designed to pre-empt damages. . . ." [16] *Saks*, 470 U.S. at 401, citing *Minutes, Conférence Internationale Du Droit Privé Aérien* 87 (Paris 1925). This wording was found to be too general and far-reaching to satisfy the various nations represented at the conference. *Id.* at 79. The Paris Conference appointed a committee of air law experts who would produce a narrower provision acceptable to nations whose law was not so liberal. *Burnett*, 368 F.Supp. at 1157. The article was revised several times by the committee and then submitted to the second conference that convened in Warsaw in 1929. The draft submitted to the conference required, as a prerequisite to liability, that the damage result from "death," "wounding" or other "bodily injury," as evidenced by the following wording:

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[15] Gérard Legier, a French commentator, agrees with the district court's conclusion, in the instant case, that the restrictive phrase "lésion corporelle" was intended to limit recovery to bodily injury. Legier notes:

> It is true that French law readily permits recovery for mental injury, however, this is so because the French texts do not use restrictive legal standards with the result that there is recovery for all types of injuries.

G. Legier, *L'Application de la Convention de Varsovie par la Juridiction Américaine Présentation de la Jurisprudence Récente*, 161 Revue Francaise de Droit Aérien 274 n.51 (1987).

[16] "Le transporteur est responsable des accidents, pertes, avaries et retards. Il n'est pas responsable s'il prouve avoir pris les mesures raisonnables pour éviter le dommage . . . ." [1925 Paris] *Conférence Internationale de Droit Privé Aérien* 87 (1936).

> The carrier shall be liable for damage sustained during carriage:
>
> (a) *in the case of death, wounding*, or any *other bodily injury* suffered by a traveler;
>
> (b) in the case of destruction, loss, or damage to goods or baggage;
>
> (c) in the case of delay suffered by a traveler, goods, or baggage.

Minutes, supra p. 15, at 264-65 (emphasis added).

The effect of this amendment was to make clear that an air carrier's liability was to be limited to damages flowing from death or bodily injuries. *Saks*, 470 U.S. at 401-03 (finding that change in early drafts of Warsaw Convention suggests an intentional change of meaning by the Convention's drafters). "By thus restricting the recovery to bodily injuries, the inference is strong that the Convention intended to narrow the otherwise broad scope of liability under the former draft and preclude recovery for mental anguish alone." *Burnett*, 368 F.Supp. at 1157.

Moreover, the legal background to the writing of the Convention and the Convention's recognized purpose belie the view that the drafters intended to permit recovery for injuries which cannot be ascertained with some degree of precision. At the time the Convention was drafted, the cause of action for mental distress was not widely recognized. Note, *Recovery For Mental Anguish Under The Warsaw Convention*, 41 J. Air L. & Com. 333, 339 (1975). Even those nations which, to some extent, permitted recovery for mental injury absent physical injury wrestled with the concept. A.F. Lowenfeld, *Hijacking, Warsaw and the Problem of Psychic Trauma*, 1 Syracuse Int'l L. J. 345, 348 (1978) (hereinafter *Lowenfeld*). For example, it was originally doubted whether "moral" damages could be awarded under French law in a breach of contract claim. *Amos and Walton, supra* p. 18, at 185.

Moreover, France's *Conseil d'Etat* formerly refused to award "moral" damages in an administrative action. *Id.* at 209. In England, the cause of action for mere mental anguish or emotional distress or grief, absent bodily injury, is *not* recognized. *McLoughlin v. O'Brien and Others*, [1982] 2 All E.R. 298, 301, 311. Moreover, it was not until the early 1940's that an English court, in dicta, recognized a cause of action for "nervous shock." *Hay (or Bourhill) v. Young*, [1942] 2 All E.R. 396, [1943] AC 92. Even then a showing of severe, positive psychiatric illness, such as anxiety neurosis or organic depression is required, as contrasted with mere mental anguish. *McLoughlin*, 2 All E.R. at 301, 311 (plaintiff suffered severe shock, organic depression and a change of personality).

The Warsaw Convention is a mitigated system of air carrier liability whose purpose is to provide uniform rules concerning liability limitations and to provide a uniform remedy that does not burden the carrier more than the Convention's provisions allow. *Eck v. United Arab Airlines, Inc.*, 15 N.Y.2d 53, 59, 255 N.Y.S.2d 249, 252, 203 N.E.2d 640, 642 (1964). It has been noted that "[m]ental disturbance is easily simulated, and courts which are plagued with fraudulent personal injury claims may be unwilling to open the door to an even more dubious field." *Prosser and Keeton*, *supra* p. 5, at 361. When the shifting context of the claim for pure psychic injury is contrasted with the Warsaw Convention's overall principle of allowing only a regulated burden to be borne by the air carriers, it becomes clear that the drafters did not intend to impose liability for fright, shock or other mental disturbances which are purely subjective and not often marked by any definite physical symptoms capable of clear medical proof.

B. The Eleventh Circuit's Construction Of "Lesion Corporelle" Conflicts With The Intent Of The Drafters As Evidenced By The Subsequent Conduct Of The Contracting Parties

The subsequent conduct of the contracting parties conclusively confirms that the parties to the Convention have understood that, (1) "lésion corporelle" is a precondition to an air carrier's liability under Article 17 and that, (2) amendment of Article 17 is necessary before liability can be imposed for pure mental injury. Almost immediately following the Convention's entry into force, early aviation law experts called for amendment of the Convention because Article 17, as originally drafted, precluded recovery for pure mental injury. *See* discussion, *supra* p. 17. In September of 1951, a committee comprised of representatives of various signatory nations met in Madrid, Spain to consider revision of the Warsaw Convention.[17] At the urging of Mr. Garnault, the *French delegate*, the conferees in Madrid voted to amend the official French text of Article 17 by substituting the words "affection corporelle" for the phrase "lésion corporelle." *Madrid Minutes*, *supra* p. 17, at 270. *See also Excerpts From The Report Of United States Delegation To Eighth Session Of The Legal Committee Of ICAO, Held At Madrid, Spain, September 1951*, 19 J. Air L. & Com. 70, 79 (1952) (hereinafter *Excerpts*). The amendment was deemed necessary because "lésion corporelle" was considered too narrow a term to permit recovery for bodily injury not necessarily associated with "the rupture of bodily tissue." *Excerpts*, *supra*, at 79. "Affection cor-

[17] The work of revising the Convention was taken up by the Legal Committee of the International Civil Aviation Organization ("ICAO") after World War II. A.F. Lowenfeld & A.I. Mendelsohn, *The United States and The Warsaw Convention*, 80 Harv. L. Rev. 497, 502 n.18 (1967). ICAO is an organization of governments established in 1947 to consider international civil aviation matters. *See* Convention on International Civil Aviation, done at Chicago, December 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295.

porelle" would broaden the category of compensable injuries and make clear that such physical injury as lung congestion or muscular paralysis, resulting from the discharge of carbon dioxide into the cabin of the aircraft, would be covered by the revised Convention. *Id.* Although this amendment has not been incorporated into Article 17, the fact that such an amendment was considered is compelling evidence that the signatory nations have not understood the phrase "lésion corporelle" to permit recovery for pure emotional injuries.

Additionally, the parties to the Warsaw Convention intended "bodily injury" in Article 17 to exclude recovery for mental injury as they have, since the Convention's entry into force, considered and consistently rejected proposals to expand the categories of compensable injuries to include pure mental injury. At the same Madrid conference, the delegates discussed the categories of personal injuries which should be covered by the revised convention and specifically declined to amend the Convention to provide for pure mental injury "in the sense of emotional upset unassociated with bodily injury." *Madrid Minutes, supra* p. 17, at 270; *Excerpts, supra* p. 25, at 79.

The issue was again raised at the conference on international air law which took place at The Hague in September 1955 and which led to the adoption of The Hague Protocol.[18] The conferees doubted that the original Warsaw Convention permitted a passenger claim for the fright or shock which a passenger might suffer as a result of an accident in international air transportation. I *Conférence Internationale de Droit Privé Aérien*, Sept. 1955,

[18] The Hague Protocol amended the original Warsaw Convention to provide, *inter alia*, for an increased liability limit to 250,000 poincaré francs. *Shawcross and Beaumont, Air Law*, at ¶ VII (14) (4th ed. 1988) (hereinafter *Shawcross and Beaumont*). It did not amend Article 17. *See* Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage By Air signed at The Hague Sept. 28, 1955, 478 U.N.T.S. 371, *reprinted in* A.F. Lowenfeld, *Aviation Law Documents* (hereinafter The Hague Protocol).

La Haye, Doc. 7686-LC/140, p. 261 (ICAO). They nevertheless rejected an amendment, proposed by the Greek delegation, substituting the phrase "any other bodily injury" by the phrase "any other *mental* or bodily injury."

The subsequent conduct of the contracting parties, therefore, confirms that Article 17 of the Warsaw Convention does not permit recovery for pure mental injury.

1. *The Eleventh Circuit's Reliance Upon The Guatemala City Protocol And The Montreal Agreement To Ascertain The Intent Of The Treaty's Drafters Is Wholly Misplaced*

The Eleventh Circuit has justified its conclusion by doubting the accuracy of the American translation of "lésion corporelle" as "bodily injury." The court noted that the official English text of the Guatemala City Protocol substitutes the phrase "personal injury" in the official English version of Article 17 while keeping the phrase "lésion corporelle" in the official French version.[19] (Pet. App. A-21). Similarly, the Eleventh Circuit noted that the Montreal Agreement and the Civil Aeronautics Board Order approving the Agreement, use the terms "bodily injury" and "personal injury" interchangeably

[19] The Guatemala City Protocol amends the Warsaw Convention and is incorporated in Montreal Protocols 3 and 4. *Shawcross and Beaumont, supra* p. 26, at ¶ VII (36). The Guatemala City Protocol creates an unbreakable airline liability limit of $125,000 for personal injury or death and permits signatory nations to establish a supplemental compensation plan to pay claims in excess of that limit. Montreal Aviation Protocols Nos. 3 and 4, Ex. B, 95-1, 1989: Hearing on S. 533 before the Committee on Foreign Relations, 101st Congress, 1st Sess. 16 (Nov. 15, 1989) (statement of Eugene J. McAllister, Asst. Sec. for Economic and Business Affairs, Dept. of State); ICAO 1 and 2 *Minutes and Documents of the International Conference on Air Law Guatemala City*, ICAO Doc. 9040-LC/167-1, 2 (1972). The Montreal Protocols are presently before the Senate for consideration.

and that the notice given to passengers advising them of the Convention's limitations uses the phrase "personal injury" instead of Article 17's "bodily injury." (Pet. App. A-19-20).[20] According to the Eleventh Circuit, this unexplained switch to "personal injury," which occurred some forty years after the original treaty was drafted, clarified the intention of the original framers that Article 17 permits recovery for "any 'personal' injury, *i.e.*, any injury suffered by the plaintiff as a person." (Pet. App. A-14).

However, the Eleventh Circuit's reliance on the Guatemala City Protocol is misplaced. The record of the proceedings at Guatemala City is devoid of any evidence that the signatories intended to effect either a clarification of the modern French text of Article 17 or a clarification of the original treaty framers' intent. *Husserl v. Swiss Air Transport Co., Ltd.*, 388 F.Supp. 1238, 1249-50 (S.D. N.Y. 1975) (change in Article 17 language at Guatemala City was made for unstated reason).[21] Therefore, since it is impossible to conclude whether the delegates at Guatemala City thought they were making a substantive change to Article 17 or that they merely intended to clarify the treaty framers' language, the Guatemala City amendments are ultimately of little help in ascertaining the meaning of the *original* Convention. *Cf. Saks*, 470 U.S. at 403-04 (comments of Guatemala City Protocol's framers regarding the term "accident" clearly indicated reason for change).

Moreover, it is noteworthy that the United States Senate has not ratified the Guatemala City Protocol.

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[20] In addition to requiring air carriers to agree to raise their liability limits and waive their "due care" defense (see discussion *supra* pp. 3-4), the Montreal Agreement requires air carriers to supply their passengers with written notice of the Convention's liability limitations. (Pet. Reply at E-2-3).

[21] *See generally* ICAO, 1 *Minutes of the International Conference on Air Law Guatemala City*, ICAO Doc. 9040/167-1 (1972).

Shawcross and Beaumont, *supra* p. 26, at ¶ VII (21). In fact, the Protocol has not been ratified by any nation. *Id.* Therefore, it is the terms of the Warsaw Convention, as originally drafted, which control Eastern's liability in the instant case. *Chan*, 109 S. Ct. at 1683. Paradoxically, while ostensibly recognizing that the Guatemala City Protocol does not apply to this case, the Eleventh Circuit has effectively construed these amendments so as to give them the same force and effect accorded treaties ratified by the Senate.[22]

Similiarly erroneous is the Eleventh Circuit's conclusion that the use of the phrase "personal injury" interchangeably with "bodily injury" in the Montreal Agreement signifies a clarification of Article 17's language. Andreas F. Lowenfeld was Chairman of the United States delegation at Montreal and was pointedly asked whether the use of "personal injury" was intended to clarify the intent of the Convention's framers that Article 17 permits claims for pure mental injury. *Lowenfeld*, *supra* p. 23, at 347-48. He responded *unequivocally* that the drafters of the Agreement did *not* discuss the issue and that the "assumption [at Montreal] was that the meaning of [Article 17] goes back to what was intended in

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[22] Moreover, the Eleventh Circuit's narrow observation that Article 3(1)(c) of the Convention (as amended by The Hague Protocol) uses "personal injury" while retaining "lésion corporelle" in the French does not aid in the proper interpretation of Article 17. Article 17 itself was *not* amended at The Hague. *See generally* ICAO, 1 *Minutes of the International Conference on Private Air Law at The Hague* (1955). That Article, therefore, did not appear in the trilingual (English/French/Spanish) text of The Hague Protocol. *See* The Hague Protocol, *supra* p. 26, Supp. at 956, *et seq.* Therefore, there exists only an authentic French text of Article 17.

Additionally, contrary to the Eleventh Circuit's conclusion, the record of the proceedings at The Hague establishes the understanding of the contracting parties that an amendment of "lésion corporelle" is needed before liability can be imposed for pure mental injury. *See discussion*, *supra* pp. 26-27.

the Warsaw Convention itself." *Id.* at 347. As to the Montreal Notice, he explained that "no legal significance should be attached to this change in wording [to personal injury] which was occasioned solely by the need to draft an intelligible notice in readable type in the space provided by the ticket booklet." *Id.* at 347 n.7. This Court has held that the Montreal Agreement did not waive any of the provisions of Article 17 which operate to qualify an air carrier's liability. *Saks*, 470 U.S. at 406-07. Despite this, the decision below has impermissibly construed the Montreal Agreement in such a way as to effectively circumvent a treaty provision. *Id.* Moreover, although the parties to the Montreal Agreement did not intend to expand their liability under Article 17, the decision below has construed the Agreement as if the parties had agreed to broaden their liability.

Finally, it has been noted that the translation of "lésion corporelle" as "bodily injury" "is as good as any translation can be." *Lowenfeld*, *supra* p. 23, at 348. As discussed above, the phrase "lésion corporelle" does *not* translate into "personal injury" in any literal or legalistic sense. Moreover, other English-speaking contracting nations to the Convention have uniformly translated "lésion corporelle" as "bodily injury" in schedules attached to legislation implementing the Warsaw Convention. Carriage by Air Act of 1961, 9 & 10 Eliz. 2, ch. 27 (Great Britain), *reprinted in Shawcross and Beaumont*, *supra* p. 26, at app. B60; Civil Aviation (Carriers' Liability) Act of 1959, sched. 2 (Australia); Carriage By Air Act of 1939, 3 Geo. VI, ch. 12 (Canada). The American translation of the treaty was before the Senate when it ratified the Convention in 1934. *Saks*, 470 U.S. at 397. Moreover, as the official State Department translation of the Warsaw Convention, it provides compelling evidence of its proper interpretation. The meaning attributed to treaty provisions by government agencies charged with their negotiation and enforcement is entitled to great weight. *United States v. Stuart*, 489 U.S.

353, ——, 109 S. Ct. 1183, 1193 (1989). Therefore, "lésion corporelle" means and has been correctly translated into "bodily injury."

Nor would a translation of "lésion corporelle" into "personal injury" be determinative of the notice issue alluded to in the decision below. (Pet. App. A-20). The phrase "personal injury" does not automatically effect notice that recovery for pure mental anguish is permitted. In the United States, courts have been reluctant to permit recovery for mere mental distress and generally require a showing of some accompanying bodily injury or intentional misconduct on the part of the tortfeasor. *See e.g.*, *Langeland v. Farmers State Bank of Trimont*, 319 N.W. 2d 26, 31 (Minn. 1982) (no recovery for negligent infliction of emotional distress absent physical injury); *see Prosser and Keeton*, *supra* p. 5, at 361. In England, courts do not allow claims for mere mental anguish or distress. *McLoughlin*, 2 All E.R. at 301, 311. The contention that the Warsaw Convention permits recovery for pure mental injury if "lésion corporelle" can be translated into "personal injury" is meaningful only to commentators who find that the device facilitates their expansive construction of Article 17. *See e.g.*, *Mankiewicz*, *supra* p. 20, at 141, 146; *Palagonia*, 110 Misc. 2d at 487, 442 N.Y.S.2d at 675. The translation of "lésion corporelle" as "personal injury" is the invention of modern commentators and not a translation which is compelled by the intent of the treaty's drafters.

C. The Decision Below Expands An Air Carrier's Liability In A United States Court Beyond That Of Its Liability In The Courts Of Other Signatories To The Warsaw Convention

In determining the proper interpretation of a treaty's terms, the opinions of other signatories are entitled to considerable weight. *Saks*, 470 U.S. at 404. Although there is not much directly on point, leading scholars in both

England and France have concluded that the application of Article 17's express terms by English and French courts would preclude claims for mere mental anguish and anxiety unaccompanied by bodily injury. A leading English aviation law expert has stated:

> If [Article 17] is interpreted literally, in accordance with the usage of the relevant words in other English law contexts, a fairly restricted meaning will be discovered. 'Wounding' has been interpreted for the purposes of §§ 18 and 20 of the Offences against the Person Act 1861 as involving a breach in the continuity of the whole skin. A fractured bone has been held not to constitute a wound when the skin remained unbroken. Such fractures, together with torn ligaments, sprained or strained muscles, and perhaps bruises, would be 'bodily injuries.' The presence of the adjective 'bodily' might well persuade an English court that 'any bodily injury' in art. 17 should be interpreted to cover this latter class of injury and should not be extended to mere mental anguish or anxiety unaccompanied by such injury.

Shawcross and Beaumont, *supra* p. 26, at ¶ VII (154). *See also Miller*, *supra* pp. 18-19, at 128-29 (literal interpretation of Article 17's terms precludes recovery for pure mental injury). The Republic of France in *Saks*, argued in this Court that a *literal* reading of Article 17's terms is the *correct* interpretation. Brief of Amicus Curiae, for The Republic of France at 9, *Air France v. Saks*, 470 U.S. 392 (1985) (No. 83-1785) (November 15, 1984). *But see Dadon v. Air France* [1984] 38 (3) P.D. 785, *rept. sub. nom. Cie Air France v. Teichner* [1985] 39 RFDA 232 [1988] 23 Eur TrL 87 (Israeli courts permit recovery).

Even if the courts of the other signatory nations could be persuaded to broadly construe Article 17, extending the reach of that Article to permit recovery for mere "fright" or "mental anguish" would still expand an air carrier's liability in United States courts beyond that of other signatory nations. In France, it has been noted that the requirement of "lésion corporelle" does not permit recovery under Article 17 for intense fright or shock. J. Tosi, *Responsabilité Aérienne* 44 (1978). Moreover, English law does not recognize a cause of action for mere mental anguish or distress. *McLoughlin*, 2 All E.R. at 301, 311; *Shawcross and Beaumont*, *supra* p. 26, at ¶ I (112) (plaintiff must establish "nervous shock," i.e., positive psychiatric illness).

The decision below defeats the Convention's purpose of uniformity by creating a cause of action for mere "mental pain and anguish," "fright," and "distress," under Article 17 which would not be recognized by courts of other signatory nations. It guarantees that United States courts will become attractive to plaintiffs seeking a more generous recovery than that which they would realize in the courts of these other nations.

III. THE DECISION BELOW UNDERMINES THE CONVENTION'S PURPOSES OF UNIFORMITY AND PREDICTABILITY BY IMPOSING STRICT LIABILITY ON CARRIERS FOR A PURELY SUBJECTIVE AND UNDEMONSTRABLE INJURY

If allowed to stand, the decision below will have a substantial impact on all international aviation. Because under the Warsaw Convention and the Montreal Agreement an air carrier is presumptively and strictly liable for its passengers' accidental in-flight injuries, the decision below imposes upon international air carriers strict liability for its passengers' subjective and undemonstrable injuries. Historically, the law has been reluctant to redress fright or shock:

> The temporary emotion of fright, so far from serious that is does no physical harm, is so evanescent a thing, so easily counterfeited, and usually so trivial, that the courts have been quite unwilling to protect the plaintiff against mere negligence, where the

elements of extreme outrage and moral blame which have had such weight in the case of the intentional tort context are lacking.

Prosser and Keeton, supra p. 5, at 361.

Therefore, recovery for pure mental distress generally requires a showing of physical injury, physical manifestation of psychic injury or extreme or outrageous misconduct by the tortfeasor. *Prosser and Keeton, supra* p. 5, at 60-65, 359-61. Courts which have analyzed the issue in this case in the context of the strict liability regime imposed upon air carriers under the Warsaw Convention and the Montreal Agreement, have properly declined to create a cause of action divorced from the traditional limitations attendant to the recovery for pure mental distress. *See e.g., Rosman*, 34 N.Y.2d at 396, 358 N.Y.S.2d at 106, 314 N.E.2d at 854; *Burnett*, 368 F.Supp. at 1157. *But see Palagonia*, 110 Misc.2d at 479, 442 N.Y.S.2d at 671. The decisions holding that the Warsaw Convention does not bar recovery for emotional injury *if state law* permits recovery, have usually decided the issue in the context of state law remedies which impose safeguards that separate the spurious from the meritorious claims. *Husserl*, 388 F.Supp. at 1247.

The purpose of the Warsaw Convention was to establish stable, predictable, and internationally uniform liability rules and limits. *Franklin Mint*, 466 U.S. at 256-57. The decision below undermines the Convention's purposes by exposing air carriers to a potentially unlimited number of frivolous and unverifiable claims. Conceivably, every hypersensitive individual with a fear of flying could require an airline to pay on a claim for the discomfort experienced on a flight beset by unavoidable turbulence.

The Eleventh Circuit has created an anomalous cause of action which opens wide the door to a flood of fictitious or frivolous litigation.

IV. THE WARSAW CONVENTION IS THE UNIVERSAL SOURCE OF AIR CARRIER LIABILITY FOR PASSENGER DEATH OR INJURY RESULTING FROM AN ACCIDENT IN INTERNATIONAL AIR TRANSPORTATION

As discussed above, the terms of the Warsaw Convention do not allow recovery for pure emotional injury unaccompanied by physical manifestations. In order that the uniformity intended by the drafters of the Convention be followed, it is imperative that the treaty be deemed the exclusive source of air carrier liability, thereby precluding recourse to national or local law.

The question of the Warsaw Convention's exclusivity is intertwined with the question of whether Article 17 comprehends recovery for pure mental or emotional injury. Courts which have read Article 17 broadly have often done so out of a concern that damages not comprehended by the Convention may give rise to state created causes of action not subject to any of the Convention's conditions or limits. *See Karfunkel v. Compagnie Nationale Air France*, 427 F.Supp. 971 (S.D. N.Y. 1977); *Husserl*, 388 F.Supp. at 1246. An expansive reading of the types of injury comprehended by Article 17 has been deemed to advance the Convention's purpose of limiting air carrier liability. *Husserl*, 388 F.Supp. at 1246-47. Thus, the courts have been forced into the broad interpretation of Article 17 out of a persistent concern that the Warsaw Convention would be circumvented and un-

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[23] The Court previously declined to address the exclusive nature of the Warsaw Convention in *Saks* because it was unclear whether the issue was raised in the court of appeals. 470 U.S. at 408. Here, in contrast, the issue was preserved by Eastern during both the trial and appellate proceedings. Indeed, although the Eleventh Circuit chose not to determine whether the Convention "provides the exclusive grounds for relief for an airline passenger involved in an accident" because this Court has not definitively spoken on the issue, it did decide that the Convention "preempts those aspects of plaintiffs' state law claims which are inconsistent with the Convention." *Floyd*, 872 F.2d at 1482 and n. 33.

dermined by resort to state law causes of actions. This Court can resolve this dilemma by holding that the Warsaw Convention constitutes the exclusive source of air carrier liability for loss or injury suffered in international air transportation.

Prior to *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979), the general rule was that the Warsaw Convention did not create a cause of action but merely imposed limits on state law causes of action. In *Benjamins*, the Second Circuit reversed its prior rulings and held that the Warsaw Convention did create a cause of action which serves as the universal source of air carrier liability. 572 F.2d at 919.

The conclusion that the treaty creates the universal source of recovery is supported by the history of the Convention and the language and intent of the drafters. The text of the Convention declares the signatories' intent as "regulating in a *uniform* manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier." Warsaw Convention, Preamble (emphasis added). *See also Franklin Mint*, 466 U.S. at 256.

The drafters of the Warsaw Convention feared a destruction of the intended uniformity if each nation applied its own law. Throughout the *Minutes*, there are numerous statements by the drafters urging that recourse to national law be restricted. For example, Mr. Ripert, a member of the French delegation stated:

> [W]e are absolutely opposed to a formula that would lead to the application of national law . . . . From our point of view, one would thus arrive [sic] in destroying the Convention, if one establishes recourse to national law upon each article . . . . I beg the delegates not to enter upon this dangerous course which would consist in reserving the result of the litigation to national law.

Minutes, supra p. 15, at 66. *See also Id.* at 65("We wish that the Convention be applied in all cases. . . . In any case, *recourse to national law must be ruled out.*") (Mr. Ambrosini, Italy) (emphasis added); *Id.* at 213 (the stipulation that liability actions under Article 24 can only be brought under the terms and limits of the Convention "touches the very substance of the Convention, because this excludes recourse to common law") (Sir Alfred Dennis, Great Britain).

The Convention, therefore, was carefully formulated to eliminate recourse to national or local law, except in expressly specified instances. Where the Convention does make reference to "local" law, such as Article 21 (contributory negligence) Article 24(2) (standing of and allocation among survivors) Article 25 (fault equivalent to willful misconduct) Article 28 (procedure) and Article 29 (running of the statute of limitations), the interpretation of the term "local" refers to the law of the nation. Where local law is not referenced and the Convention does not specify relief, the treaty precludes all other remedies. *See In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, 535 F.Supp. 833, 845 (E.D. N.Y. 1982) *aff'd*, 705 F.2d 85 (2d Cir. 1983) ("the language of Article 24 was included specifically for the purpose of preventing the institution of independent claims outside the sphere of the Convention . . . [and] . . . would have no meaning if this exclusivity argument were rejected and plaintiffs were permitted to assert independent causes of action under [local] law").

Several appellate courts have held that the Warsaw Convention is the exclusive source of air carrier liability where it applies. *See Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 737 F.2d 456, 458 (5th Cir. 1984), *cert. denied*, 469 U.S. 1186 (1985). *See also In re Mexico City Aircrash of October 31, 1979*, 708 F.2d 400 (9th Cir. 1983); *Benjamins*, 572 F.2d at 919. Because the issue is squarely before this Court, and

because the Second, Fifth, and Ninth Circuits' reasoning is more consistent with the treaty language and the intent of the drafters, the Court should pronounce that the Warsaw Convention provides the exclusive remedy for passenger death or injury sustained in the event of an accident in international air travel.

It is well established that federal law will impliedly preempt the application of state law where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Fidelity Fed. Sav. and Loan Assn. v. de la Cuesta*, 458 U.S. 141, 153 (1982); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). *See also Floyd*, 872 F.2d at 1482 n.33. In *Boehringer-Mannheim*, the First Circuit noted that all state law causes of action would necessarily conflict with the Convention due to the interests of national and international uniformity and must therefore be preempted. 737 F.2d at 459. Similarly, in *Reed v. Wiser*, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977), the Second Circuit stated:

> [A] fundamental purpose of the signatories to the Warsaw Convention . . . was their desire to establish a uniform body of world-wide liability rules to govern international aviation, which would supersede with respect to international flights the scores of differing domestic laws. . . . Confronted with the prospect of a jungle-like chaos unless a uniform system of liability rules governing fundamental aspects of international air disaster litigation was devised, the framers of the Convention proceeded to draft a treaty which laid down uniform rules . . . .

Reed, 555 F.2d at 1090, 1092 (citations omitted).

Without this Court's determination that the Warsaw Convention is a passenger's exclusive remedy, the drafters' intent to "reduce, not to increase, the economic uncertainties of air transportation" will be thwarted. *Franklin Mint*, 466 U.S. at 260.[24] A definitive determination that the Warsaw Convention is both exclusive and preclusive will not only serve to guide the airline industry and the traveling public, but will also foster the intent of the drafters to uniformly regulate an air carrier's liability for injuries caused by an accident in international air transportation.

CONCLUSION

For the foregoing reasons, Eastern respectfully urges this Court to reverse the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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[24] Although the Supreme Court of Florida has determined that recovery for pure emotional injury in this case is not compensable under state remedies, the court did not bar all claims for pure emotional injury under state law, only the claim under the facts of this particular case. *King*, 557 So.2d at 576. Therefore, passenger claims for emotional injury can still arise in other Florida cases, unless this Court determines that the Warsaw Convention establishes the only available remedy for injuries arising from accidents occurring in international air transportation.

(6)

No. 89-1990

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In The

Supreme Court of the United States

October Term, 1990

EASTERN AIRLINES, INC.,

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v.

ROSE MARIE FLOYD and
TERRY FLOYD, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF FOR THE RESPONDENTS

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BRIEF FOR THE RESPONDENTS

STATEMENT OF THE CASE

Eastern's statement of the case is accurate. Unfortunately, its subsequent argument – which asserts that the Eleventh Circuit's opinion "has created an anomalous cause of action which opens wide the door to a flood of fictitious or frivolous litigation" – is hyperbolic in the extreme (Petitioner's brief, p. 34). The opinion does no such thing, and we deem it prudent to emphasize an

aspect of the case briefly to ensure that the Court is not misled by the petitioner's rhetorical excesses.

The flight in question departed Miami International Airport on May 5, 1983, bound for Nassau, in the Bahamas. En route to Nassau, one of the airplane's three jet engines lost oil pressure, and it was shut down by the flight crew. The airplane was turned around to return to Miami. Shortly thereafter, oil pressure was lost on the second and third engines, and those engines failed. Without power, the airplane began losing altitude rapidly, and the passengers were told that the airplane would be ditched in the Atlantic Ocean. Understandably, the engine failures and the announcement of the impending crash landing caused a considerable amount of mental distress among the passengers. Fortunately, after an extended period of descending flight without power, the flight crew was able to restart the engine which had initially been shut down, and land the airplane safely at Miami International Airport before that third engine failed.

Following the incident, it was discovered that, during routine maintenance on each engine prior to flight, Eastern's maintenance personnel had failed to install a required "O-ring" to seal against oil leaks. The result was that oil in the engines had been pumped overboard through the gaps left by the omitted O-rings. It was also discovered that Eastern had experienced no less than a dozen prior engine failures for the identical reason, but that Eastern had done nothing to educate its maintenance personnel or otherwise correct this oft-repeated life-threatening omission. The incident was clearly an "accident" within the meaning of that term in Article 17 of the

Warsaw Convention, and the passengers' mental distress was both genuine and severe. At least two of the passengers suffered physical injury from their mental distress.

All of these things were alleged in the several amended complaints (*see* Joint Appendix, 3-9) – and because Eastern obtained a "judgment on the pleadings", all of these things must be accepted as true at this point in the proceedings.[1] There is therefore no basis

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[1] It is also worth noting that the allegations *are* true. In a recent autobiography, Frank Borman, Eastern's president at the time of the incident in suit, publicly conceded the airline's responsibility for the incident:

> . . . I hadn't been satisfied with our maintenance operation, and after a widely publicized incident involving one of our L-1011s – a near-ditching in the Atlantic – I decided changes had to be made. The Tri Star had lost power in all three engines, a multiple malfunction traced to faulty installation of oil rings. There had been sloppy work by inadequately supervised mechanics.
>
> . . . .
>
> I wasn't suprised that Eastern was targeted for an investigation [by the FAA]. The near-ditching incident, plus our known financial difficulties, had made us suspect. Yet, I was confident we had cleaned up our act after that L-1011 embarrassment. Some thought we should have fired the mechanics responsible, but I felt management was partially at fault – we had changed certain engine maintenance procedures without making sure the word had filtered down to the mechanics directly involved. . . .

Frank Borman with Robert J. Serling, *Countdown, An Autobiography*, pp. 409-12 (William Morrow, New York, 1988).

whatsoever for Eastern's suggestion that the plaintiffs' mental injuries are "fictitious or frivolous", or otherwise undeserving of compensation – nor is there any basis for the suggestion that recognizing a cause of action for the redress of those injuries would be "anomalous".

SUMMARY OF ARGUMENT

I. In the interest of brevity, and because we do not believe we can improve on the court of appeals' analysis of the issue in any significant way, we simply adopt Section III of the court of appeals' opinion as our primary argument here. We have three brief additional observations to make. First we note that Eastern's proposed construction of Article 17 necessarily concedes that the phrase "lésion corporelle" *does* authorize a recovery of damages for mental distress in at least some cases. Given that concession, Eastern cannot ask the Court to construe the phrase to exclude *all* damages for mental distress, and it has not. It has asked the Court instead to read the phrase to include damages for mental distress if accompanied by physical impact or injury, and to exclude damages for mental distress if unaccompanied by physical impact or injury. In our judgment, there are not enough words in the phrase "lésion corporelle" to spell out such a complex distinction. The phrase either includes or excludes such a recovery, but it clearly cannot do both. The only logical construction of the phrase which accords with Eastern's concession is that the phrase allows the recovery of damages for mental distress.

Second, we think Eastern has badly overstated the purpose of the "impact rule" and the consequences which will follow from the court of appeals' refusal to read its complexities into the phrase "lésion corporelle". Damages for psychic injury and mental distress are normally recoverable in most tort actions; the "impact rule" is simply an artificial device to sort the significant from the trivial – to prevent, as a matter of judicial policy, inundation of the judiciary with trifling claims. Because this is its purpose, the "impact rule" has been relaxed in numerous types of cases, and the facts of the instant case clearly fall into these exceptional categories, rather than into the category of the trivial. In addition, the type of line-drawing represented by the "impact rule" is unnecessary in this case, because the significant has already been sorted from the trivial by the Warsaw Convention itself. Before there can be a recovery under Article 17, there must have been an "accident", and we take it to be self-evident that an aircraft "accident" is likely to cause genuine and severe mental distress, and that the term itself therefore excludes the type of trivial claims which the "impact rule" is designed to exclude. In short, because the significant has already been sorted from the trivial by Article 17 itself, there is no need for this Court to impose the common law's "impact rule" upon the Warsaw Convention to eliminate trifling claims.

Third, even if the phrase "lésion corporelle" means no more than "bodily injury", we think the phrase "bodily injury" includes both mental and physical injury (as Eastern has conceded it does, at least where the requisite physical impact exists). After all, a mental injury is an injury to the brain, and the brain is certainly an

organ of the body. The current view of the human life form is that anxiety, fear, mental anguish, psychic trauma and the like are physiological reactions to external stimuli – i. e., that a "mental injury" is, in fact, a "bodily injury". A treaty, like a Constitution, is a flexible instrument formulated in broad terms to accommodate the future – and just as the Warsaw Convention can be read flexibly enough to accommodate aviation's growth from ragwing bi-planes to jumbo jets in the 60 years since its adoption, it can be read flexibly enough to accommodate this modern understanding of the nature of mental injury.

II. In the concluding section of its argument, Eastern asks the Court to decide an additional question – whether the Warsaw Convention so entirely preempts the field that it must be considered an "exclusive" remedy, or whether it preempts local law remedies only to the extent that they are inconsistent with it. We do not believe this question is properly before the Court. The question was not one of the "Questions Presented" in Eastern's petition for writ of certiorari. The question was also expressly left open below, so it does not fall within the "plain error" exception to the rule. The advisory opinion which Eastern seeks also asks the Court to resolve a question which is entirely moot at this point, since the Florida Supreme Court has held that the passengers of Flight 855 have no state law causes of action. Given this holding, the preemption issue initially lurking in these cases no longer exists – and there is therefore no controversy over that point which needs to be resolved by this Court. For these three reasons, we do not believe the second question smuggled into Eastern's argument is properly before the Court.

The *reason* why Eastern has requested an advisory opinion on the question is that it hopes to overturn a decision of the Chief Judge of the Southern District of Florida, which currently limits the removal jurisdiction of that court in actions arising out of accidents in international air transportation. *Rhymes v. Arrow Air, Inc.*, 636 F. Supp. 737 (S.D. Fla. 1986). This decision holds, in essence, that the Warsaw Convention does not entirely preempt the field, but only preempts local law to the extent that it is inconsistent with it; that a plaintiff may therefore elect to frame his complaint in terms of local law, to which the preemptive "conditions and limits" of the Warsaw Convention can be pled in defense; and that, because of the settled "well-pleaded complaint rule", the availability of the federal defense will not justify removal of the action to federal court.

If, as *Rhymes* holds, the Warsaw Convention does not entirely preempt the field, but only preempts those aspects of local law which are inconsistent with it, then the settled "well-pleaded complaint rule" simply required the conclusion reached in *Rhymes*. This Court has created only one very limited exception (in only two very specific contexts) to that rule – the "complete preemption" doctrine, which holds that if the preemptive force of a federal statute is truly "extraordinary", the statute converts an ordinary state common law complaint into one stating a federal claim for purposes of the "well-pleaded complaint rule". Eastern's contention that the Warsaw Convention is "exclusive" is an attempt to fit the Convention within this infrequently applied exception to the general rule. In our judgment, neither the express language of the Convention nor the plain import of its

legislative history can ever justify a conclusion that the Convention was intended to "entirely preempt" the field.

In the first place, it is clear from the face of the Convention itself that its preemptive effect can only be partial, because the Convention only partially addresses the numerous issues which would necessarily arise in any action to recover damages for death or injury in international air transportation. We will examine the provisions of the Convention which point to this conclusion in some detail in the argument which follows. We will also examine the Minutes of the Convention in some detail, because it is both evident from the Minutes, and sometimes express in them, that the intention of the drafters was *not* to write a document which entirely preempted the field, but to write a document which regulated only certain areas of international air law, leaving all unregulated areas to local law. In the process, we will demonstrate that the Warsaw Convention undeniably stops well short of the "complete preemption" theory upon which Eastern's quarrel with *Rhymes* squarely depends, and we respectfully submit that *Rhymes* was correctly decided.

ARGUMENT

I

THE COURT OF APPEALS CORRECTLY HELD THAT ARTICLE 17 OF THE WARSAW CONVENTION PROVIDES A REMEDY FOR PSYCHIC INJURY AND EMOTIONAL DISTRESS UNACCOMPANIED BY PHYSICAL INJURY, WHEN CAUSED BY AN ACCIDENT IN INTERNATIONAL AIR TRANSPORTATION.

It is evident from the court of appeals' opinion that the issue presented here was exhaustively researched,

thoughtfully analyzed, and carefully resolved. The opinion also contains its own thorough rebuttal to the several challenges leveled at it here. We do not believe that we can improve upon it in any significant way – and to spare the Court the need to read our argument twice, we simply adopt Section III of the court of appeals' opinion as our primary argument here. *See Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1467-80 (11th Cir. 1989). We will supplement that argument with a brief rebuttal to some points which Eastern has raised for the first time here, and we will close with three brief, additional observations which we believe relevant to consideration of the issue.

Eastern argues that the phrase "lésion corporelle" is "clear and unambiguous". Given the conflict in decisions which may have provoked the grant of certiorari; the scholarly disagreement over the meaning of the phrase (which Eastern has highlighted in its brief); and the fact that, as the court of appeals observed, "[t]he question whether Article 17 encompasses recovery for purely mental injuries has confounded courts and commentators for many years" (*Floyd, supra* at 1471) – we doubt that the Court can comfortably declare the phrase "clear and unambiguous". Eastern also argues that "international standards", rather than French law, were meant to govern interpretation of the Warsaw Convention. The short answer to this argument can be found in *Air France v. Saks*, 470 U.S. 392, 399 (1985), in which the Court held that, to determine the meaning of any given term in Article 17, it "must consider its French legal meaning".

Eastern also argues that the drafters of the Convention used the phrase "lésion corporelle" (or "bodily

injury", in the English translation) when discussing Article 17, and that the discussion therefore supports its construction of Article 17. In our judgment, this argument proves nothing. It is the *meaning* of the phrase which is in issue here, and the fact that the drafters used the phrase itself in discussing the phrase certainly sheds no light on *that* question. Eastern also refers the Court to several secondary authorities for the proposition that the phrase "lésion corporelle" was not originally intended to include claims for purely mental injury. However, the most that these secondary authorities reflect is scholarly disagreement over the intention of the drafters and the meaning of the ambiguous phrase, and sentiment that the ambiguity ought to be resolved in favor of liability for purely mental injury (or that Article 17 should be clarified to make the point certain) – so these authorities add little to Eastern's position here.

Eastern next argues that the court of appeals should not have looked to the 1966 Montreal Agreement or the 1971 Guatemala City Protocol as examples of the "subsequent conduct of the contracting parties". It suggests instead that the more appropriate "subsequent conduct" is that of the earlier 1951 meeting of the ICAO in Madrid, at which the ICAO proposed but did not adopt a revision to Article 17 which would have made the recoverability of damages for mental injury explicit rather than ambiguous. The revisions proposed at the 1951 Madrid conference appear to have been stillborn, however; and because the conference amounted to no more than negative action on interim discussions concerning an ongoing review, the probative value of the discussions to the question presented here can hardly be elevated above the subsequent

positive conduct of the contracting parties represented by the Montreal Agreement and the Guatemala City Protocol. We therefore believe that the court of appeals properly gave more weight to the subsequent positive actions of the contracting parties. The fact also remains that, because of the conduct of the contracting parties which resulted in the Montreal agreement, the respondents in the instant case were provided with a ticket which translated the phrase "lésion corporelle" into the phrase "personal injury". And with that brief rebuttal behind us, we turn to the three additional observations which we promised the Court.

First, we note that, by bottoming its suggested construction of Article 17 exclusively upon the artificial line drawn by the common law's "impact rule", Eastern has necessarily conceded that Article 17 permits recovery of damages for psychic injury and mental distress if accompanied by a physical impact or injury. Eastern has therefore conceded that the two-word phrase in issue here, "lésion corporelle", *does* authorize a recovery of damages for mental distress in at least some cases. Given that concession, Eastern cannot ask the Court to construe the phrase to exclude *all* damages for mental distress, and it has not. It has asked the Court instead to read the phrase to include damages for mental distress if accompanied by physical impact or injury, and to exclude damages for mental distress if unaccompanied by physical impact or injury.

In our judgment, there are not enough words in the phrase "lésion corporelle" to spell out such a complex distinction. The phrase either includes or excludes such a recovery, but it clearly cannot do both. Therefore, even if

the Court should be unpersuaded by the court of appeals' reasoning, it ought to be persuaded that the court nevertheless reached the only result which simple logic will permit. *See Chan v. Korean Air Lines, Ltd.*, 490 U.S. ___, 109 S. Ct. 1676, 104 L. Ed.2d 113, 127 (1989) (Court cannot "alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial", but must give it a logical interpretation bottomed upon ordinary rules of construction).

Second, we think Eastern has badly overstated the purpose of the "impact rule" and the consequences which will follow from the court of appeals' refusal to read its complexities into the phrase "lésion corporelle". The common law does not deem all claims for psychic injury and mental distress to be "fictitious or frivolous", as Eastern would have the Court believe. In fact, damages for psychic injury and mental distress are normally recoverable in most tort actions – because, as a matter of human experience, mental injuries are considered every bit as real and significant (and therefore deserving of compensation) as physical injuries. *See Restatement (Second) of Torts*, §905 (1965). *Cf. Restatement (Second) of Torts*, §47, Comment b (1965). The "impact rule", to the extent that it has survived at all in the common law, has a different purpose altogether: it is primarily an artificial device to sort the significant from the trivial – to prevent, as a matter of judicial policy, inundation of the judiciary with trifling claims. *See Restatement (Second) of Torts*, §§46, 436A (1965) (and Comments thereto); Prosser & Keeton, *The Law of Torts*, §54 (5th Ed. 1984).

Because this is its purpose, the "impact rule" has been relaxed in numerous types of cases: where the

defendant, because it is a "common carrier", owed the highest duty of care to the plaintiffs; where the defendant's tortious conduct has been of an aggravated nature; or where the defendant's tortious conduct has been such that genuine psychic injury and mental distress is a predictable consequence of the conduct. *See Restatement (Second) of Torts*, §§46, 47 (1965); Prosser & Keeton, *supra*, §54. The facts of the instant case clearly fall into these exceptional categories, rather than into the category of the trivial. As the court of appeals held below (in a ruling not challenged here), Eastern's conduct – in allowing these *13th*, *14th*, and *15th* engine failures for the same omitted "O-ring" – will support a finding of "wilful misconduct". Eastern is also a common carrier which owes its passengers the highest duty of care recognized in the law. And, of course, it is simply undeniable that the alleged psychic injuries and mental distress of the passengers of Flight 855 are more likely to be genuine than to be feigned. The facts in this case therefore do not commend the type of artificial line-drawing represented by the purely pragmatic policy which initially motivated the common law's "impact rule".

There is also no need for the Court to cleave the phrase "lésion corporelle" into the two complex categories which Eastern purports to find in it to accomplish what the "impact rule" is designed to accomplish, because the significant has already been sorted from the trivial by the Warsaw Convention itself. Before there can be a recovery under Article 17, there must have been an "accident" – defined as "an unexpected or unusual event or happening that is external to the passenger", in contradistinction to "the passenger's own internal reaction to

the usual, normal, and expected operation of the aircraft". *Air France v. Saks*, 470 U.S. 392, 405, 406 (1985). We take it to be self-evident that an aircraft "accident" is likely to cause genuine and severe mental distress, and that the term itself therefore excludes the type of trivial claims which the "impact rule" is designed to exclude – like the rudeness of stewardesses, in-flight turbulence, or any other trivial, mentally aggravating aspect of international air transportation which a passenger should be prepared to expect and accept.

There is therefore no justification whatsoever for the following overstated assertion in Eastern's brief:

> The decision below undermines the Convention's purposes by exposing air carriers to a potentially unlimited number of frivolous and unverifiable claims. Conceivably, every hypersensitive individual with a fear of flying could require an airline to pay on a claim for the discomfort experienced on a flight beset by unavoidable turbulence.
>
> The Eleventh Circuit has created an anomalous cause of action which opens wide the door to a flood of fictitious or frivolous litigation.

(Petitioner's brief, p. 34). Given the threshold requirement of Article 17 that there can be no recovery of any damages without an "accident", this "parade of horribles" will never occur. In short, because the significant has already been sorted from the trivial by Article 17 itself (not to mention the fact that even the significant claims have also been artificially "capped" by an unconscionably low limitation upon damages), there is no need for this Court to impose the common law's "impact rule" upon the Warsaw Convention to eliminate trifling claims.

Third, and finally, even if the phrase "lésion corporelle" means no more than "bodily injury", we think the phrase "bodily injury" includes both mental and physical injury (as Eastern has conceded it does, at least where the requisite physical impact exists). After all, a mental injury is an injury to the brain, and the brain is certainly an organ of the body. There was a time in the not so distant past of human evolution, of course, when the mind and the body were considered to be separate and distinct entities. Modern scientific developments have clearly put that mythic view of our being to rest, however – and, although the precise mechanisms of our thoughts and feelings remain largely uncharted, there is general scientific agreement that the sophisticated mental processes of our brain are, in actuality, mere physiological processes involving electrical charges and chemical reactions. In short, the current view of the human life form is that anxiety, fear, mental anguish, psychic trauma and the like (except where caused by innate physiological abnormality) are physiological reactions to external stimuli – i. e., that a "mental injury" is, in fact, a "bodily injury".

Judge Tyler put the point nicely in *Husserl v. Swiss Air Transport Co., Ltd.*, 388 F. Supp. 1238, 1250 (S.D.N.Y. 1975), as follows:

> . . . However, "death", "wounding", and "bodily injury" in English or in French can, almost as easily, all be construed to relate to emotional and mental injury.
>
> "Bodily injury" is perhaps particularly significant in this regard because of the vast strides which have been taken relatively recently in the fields of physiology and psychology. It becomes

> increasingly evident that the mind is part of the body. Today, it is commonly recognized that mental reactions and functions are merely more subtle and less well understood physiological phenomena than the physiological phenomena associated with the functioning of the tissues and organs and with physical trauma. Therefore, the phrase at issue could easily be construed to comprehend all personal injuries which directly and adversely affect the organic functions of a human being.

Such a construction clearly makes much more contemporary sense than a construction which perpetuates a now thoroughly discredited view of human physiology, and we commend it to the Court as an additional justification for construing the phrase "lésion corporelle" to mean what Eastern has already acknowledged it to mean on the ticket it sold the respondents in these cases: "personal injury" – a broad phrase which clearly subsumes and includes the genuine mental injuries suffered by the respondents.

To Eastern's anticipated reply that the Court's task is to determine what the drafters of the Warsaw Convention meant by the phrase "lésion corporelle" in 1929, we remind the Court simply that it is not chained to discredited scientific and philosophical understandings of that era. A treaty, like a Constitution, is a flexible instrument formulated in broad terms to accommodate the future – and just as the Warsaw Convention can be read flexibly enough to accommodate aviation's growth from ragwing bi-planes to jumbo jets in the 60 years since its adoption, it can be read flexibly enough to accommodate the modern understanding of the nature of mental injuries:

Those called upon to construe a treaty should, in the words of Judge Clark, strive to "give the specific words of a treaty a meaning consistent with the genuine shared expectations of the contracting parties." *Maximov v. United States*, 299 F.2d 565, 568 (2d Cir. 1962), *aff'd*, 373 U.S. 49, 83 S. Ct. 1054, 10 L. Ed.2d 184 (1963). These expectations can, of course, change over time. Conditions and new methods may arise not present at the precise moment of drafting. For a court to view a treaty as frozen in the year of its creation is scarcely more justifiable than to regard the Constitutional clock as forever stopped in 1787. Justice Holmes's counsel concerning Constitutional construction, set forth in his opinion in *Missouri v. Holland*, 252 U.S. 416, 433, 40 S. Ct. 382, 383, 64 L. Ed. 641 (1920), applies with equal force to the task of treaty interpretations:

> [W]hen we are dealing with words that also are a constituent act . . . we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.

The conduct of the parties subsequent to ratification of a treaty may, thus, be relevant in ascertaining the proper construction to accord the treaty's various provisions. . . .

It cannot be doubted, therefeore, that the Warsaw Convention now functions to protect the passenger from the many present-day hazards of air travel and also spreads the accident cost of air transportation among all passengers. . . .

We conclude, in sum, that the protection of the passenger ranks high among the goals which the Warsaw signatories now look to the Convention to serve. . . .

. . . .

> We believe, moreover, that the result we have reached furthers the intent of the Warsaw drafters in a broader sense. The Warsaw delegates knew that, in the years to come, civil aviation would change in ways that they could not foresee. They wished to design a system of air law that would be both durable and flexible enough to keep pace with these changes. Our holding today confirms the framers' belief that the ever-changing needs of the system of civil aviation can be served within the framework they created.

Day v. Trans World Airlines, Inc., 528 F.2d 31, 35-37 (2nd Cir. 1975) (footnotes omitted), *cert. denied*, 429 U.S. 890 (1976). *See Air France v. Saks*, 470 U.S. 392 (1985) (treaties are entitled to liberal construction). If this sentiment is relevant here, and we believe it is, we respectfully submit that even if the phrase "lésion corporelle" means only "bodily injury", as Eastern insists, a mental injury *is* a bodily injury – and Article 17 therefore authorizes a recovery of damage for the genuine injuries undeniably suffered by the respondents in the unforgivable "accident" which is the subject of the instant cases.

II

THE SECOND QUESTION PRESENTED IN THE ARGUMENT SECTION OF THE PETITIONER'S BRIEF IS NOT PROPERLY BEFORE THE COURT. ON THE MERITS, THE WARSAW CONVENTION DOES NOT ENTIRELY PREEMPT THE FIELD; IT PREEMPTS LOCAL LAW REMEDIES ONLY TO THE EXTENT THAT THEY ARE INCONSISTENT WITH IT.

In the concluding section of its argument, Eastern asks the Court to decide an additional question – whether the Warsaw Convention so entirely preempts the field

that it must be considered an "exclusive" remedy, or whether it preempts local law remedies only to the extent that they are inconsistent with it. We do not believe this question is properly before the Court. In the first place, the question was not one of "Questions Presented" in Eastern's petition for writ of certiorari. Rule 14.1(a) states that "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court". Rule 24.1(a) states that "the brief may not raise additional questions or change the substance of the questions already presented in [the petition for writ of certiorari]". *See Irvine v. California*, 347 U.S. 128, 129 (1954) ("We disapprove the practice of smuggling additional questions into a case after we grant certiorari. The issues here are fixed by the petition . . . ").

There is a limited exception to this rule, for "plain error". That exception is not implicated here, however, because the question was not even decided below. Instead, it was expressly left open:

> Eastern suggests that we hold that the Convention provides the exclusive source of a right of recovery and thus completely preempts state law causes of action in accidents involving international air transportation. At this stage of the case, however, we determine only that the Convention preempts those aspects of plaintiffs' state law claims which are inconsistent with the Convention. We decline to speculate further on the issue of whether the Warsaw Convention entirely preempts state law causes of action once it provisions are triggered by an "accident" within the meaning of Article 17. . . .

Floyd, supra at 1482. In short, Eastern has impermissibly asked this Court for an advisory opinion on a point not

even ruled upon below – not the correction of a "plain error".

The advisory opinion which Eastern seeks also asks the Court to resolve a question which is entirely moot at this point. As the court of appeals' opinion observes, whether the respondents in these cases have any causes of action under state law "must await the Supreme Court of Florida's decision on the issue" (in the companion case which was not removed to federal court). *Floyd, supra* at 1490. Subsequent to the court of appeals' opinion, the Florida Supreme Court held that the passengers of Flight 855 had alleged no state law causes of action. *See Eastern Airlines, Inc. v. King*, 557 So.2d 574 (Fla. 1990). Given this holding, the preemption issue initially lurking in these cases no longer exists – and there is therefore no controversy over that point which needs to be resolved by this Court. For all of these reasons, we do not believe the second question smuggled into Eastern's argument is properly before the Court.

Because the question is not properly before the Court, we will address its merits as briefly as possible. Before we reach the merits, however, we should explain the *reason* why Eastern (or more accurately, its insurers) has requested an advisory opinion on the question. The reason for the request is that Eastern hopes to overturn a decision of the Chief Judge of the Southern District of Florida, which currently limits the removal jurisdiction of that court in actions arising out of accidents in international air transportation: *Rhymes v. Arrow Air, Inc.*, 636 F. Supp. 737 (S.D. Fla. 1986). Judge King's opinion speaks nicely for itself on the point placed in issue here:

> The proposition presented by the Defendants in these cases is that the cause of action created by the Convention has preempted the application of state wrongful death statutes for loss occurring during international flights. The Defendants argue that the cause of action created by the Convention is exclusive and that no other cause of action for wrongful death will lie. The Plaintiffs on the other hand argue that the remedy may be exclusive as to limitation on damages allowed by the Convention but that the cause of action is not exclusive and may be based in state law.
>
> A distinction must be drawn between an exclusive remedy and exclusive cause of action. The courts that have addressed the issue have all held that the limitations of the convention have always been the exclusive remedy even when the cause of action was based on state law. The amount of recovery is limited by the terms of the convention. The cause of action on which the recovery is based is not limited by the convention. Both state law and the convention may provide a cause of action. Any recovery, no matter how founded, will be subject to the limitations of the convention. Conflicting provisions of state law will be preempted by the limitations imposed by the convention.
>
> The language of the convention itself implies that the cause of action created by the Convention is not exclusive. The Convention states that "any action for damages *however founded*, can only be brought subject to the conditions and limits set out in this convention." 49 U.S.C. § 1502 note, Art. 24(1) (emphasis added). This provision contemplates the application of the convention limitations to actions founded on a basis other than that of the convention. The convention further allows the suit for damages to be brought in a number of locations.

> An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principle [sic] place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination. 49 U.S.C. § 1502 note, Art. 28(1).

This language contemplates allowing the plaintiff his choice of forum limited only by the provision cited above.

The applicable case law supports the theory that the Convention is not the exclusive cause of action for recovery for [sic] damages. *Tokio Marine & Fire Ins. v. McDonnell Douglas Corp.*, 617 F.2d 936 (2d Cir. 1980). "The best explanation for the wording of Article 24(1) appears to be that the delegates did not intend that the cause of action created by the Convention to be exclusive. For example in the United States, state law causes of action may be invoked by plaintiffs injured during international air transportation." *In Re Mexico City Aircrash, supra* 708 F.2d 400, at 414, n.25.

Faced with an almost identical procedural background the Court, when considering the Korean Airlines tragedy, held a well pleaded complaint based solely on a state law cause of action was not removable to the federal district court under the convention and remanded. *Van Ryn v. Korean Airlines, et al.*, 84-6525, slip op. (C.D. Cal. 1985).

. . . .

There is no question that when a state cause of action is in conflict with the provisions of the Convention the conficting provision of the state action will be preempted by the applicable provisions of the Convention. *Boehringer, supra*.

> The application of California law suggested here necessarily conflicts with the congressional scheme. Neither uniformity or effective limitation of the airlines liability could be achieved if the state law doctrines could be invoked to circumvent the application of the limitation. Accordingly we hold that the California law is preempted by the Warsaw Convention to the extent that California law would prevent the application of the conventions limitations on liability.

In Re Aircrash in Bali Indonesia, 684 F.2d 1301, at 1308 (9th Cir. 1982). The Convention being a treaty of the United States is thus afforded supremacy over conflicting state law. *Missouri v. Holland*, 252 U.S. 416, 40 S. Ct. 382, 64 L. Ed. 641 (1920).

A review of the cases leads to the conclusion that the Plaintiff may choose to state his cause of action solely on a state law theory and bring the action in state court subject to the limitations of the Convention. If the state law conflicts with the Convention, the Convention will preempt the portion of the state remedy that is in conflict. Thus there are four types of actions available to the Plaintiff; firstly if diversity is present and the complaint meets the other requirements the Plaintiff may bring his complaint in federal court under 28 U.S.C. § 1332. If the Plaintiff so chooses he may bring a cause of action exclusively under the Warsaw Convention and if he wishes he might attach a state cause of action. This type of case could be brought directly in federal court under 28 U.S.C. § 1331 or in the appropriate state court. Of course, if this type of action was brought in state court it could be properly removed to federal court.

The Plaintiffs in the instant cases have chosen to state their cause of action exclusively under a

state wrongful death statute and have brought the current litigation in state court. The Defendants have petitioned for removal of these causes and have filed answers that plead the limitation provisions of the Warsaw Convention as a defense. The mere pleading of a federal statute or treaty as a defense will not be enough to invoke federal jurisdiction through removal if a federal cause of action does not appear on the face of the well pleaded complaint. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S. Ct. 2841, 77 L. Ed.2d 420 (1983); *Hunter v. United Van Lines*, 746 F.2d 635 (9th Cir. 1984); *Salveson v. Western States Bankcard Association*, 731 F.2d 1423 (9th Cir. 1984). "When, as in the case before us, plaintiff presents a state-law claim and defendant counters by arguing that federal law preempts the state law on which Plaintiff relies, the federal claim appears by way of defense. Under the well pleaded complaint rule federal jurisdiction over such a claim is lacking." *Hunter, supra* 746 F.2d 635, at 639-640. If the federal courts were to allow removal whenever a federal defense is raised to a state cause of action, the dockets of the federal bench would become inundated with a flood of state litigation.

There is no question that if the Plaintiff had chosen to he could have plead [sic] a federal cause of action. The Plaintiff made the affirmative choice not to so plead and courts are reluctant to disturb the Plaintiff's chosen forum. The courts have extensively addressed this proposition in the area of forum non-conveniens. "[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501 at 507, 67 S. Ct. 839, at 843, 91 L. Ed. 1055 (1947). "[T]he plaintiff's choice of forum is to be respected unless the balance of

both public and private interests strongly justifies a transfer." *Manu International S. A. v. Avon Products, Inc.*, 641 F.2d 62, at 65, (2d Cir. 1981). *See also, Liaw Su Teng v. Skaarup Shipping Corp.*, 743 F.2d 1140 (5th Cir. 1984); *Carpenter v. Hall*, 352 F. Supp. 806 (S.D.Tex.1972). Pleading a defense under the Warsaw Convention as the Defendants have done will not lay a proper basis for removal to this Court. Accordingly therefore:

It is ORDERED and ADJUDGED that the several motions for remand be and they are hereby GRANTED. The cases removed to this Court from the state court which based their cause of action exclusively on a state cause of action be and hereby are REMANDED to the Circuit Court for the Eleventh Judicial Circuit in and for Dade County, Florida.

636 F. Supp. at 740-42.[2]

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[2] The court of appeals' opinion contains a lengthy footnote purporting to collect two divergent lines of authority on the scope of the preemption effected by the Warsaw Convention. *Floyd, supra* at 1482 n. 33. An examination of the decisions collected in the footnote will reveal that the two lines of authority involve mostly semantic differences rather than substantive differences. Most of the decisions cited in support of the "complete preemption" theory advanced by Eastern here do not really grapple with the issue. Most of them are like *Floyd*, in which it was not really necessary to decide the issue, because either preemption theory produced the same result. And most of them simply conclude that, because of a preemption effected by the Warsaw Convention on the facts of the case, the Convention was "exclusive" – but that is really only a different way of saying what *Rhymes* says, that the Convention preempts all inconsistent provisions of local law.

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If, as *Rhymes* holds, the Warsaw Convention does not entirely preempt the field, but only preempts those aspects of local law which are inconsistent with it, then the settled "well-pleaded complaint rule" simply required the conclusion reached in *Rhymes*. *See, e. g., Oklahoma Tax Commission v. Graham*, 489 U.S. 838 (1989); *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987); *Franchise Tax Board v. Laborers Vacation Trust*, 463 U.S. 1 (1983); *Pan American Petroleum Corp. v. Superior Court*, 366 U.S. 656 (1961); *Gully v. First National Bank*, 299 U.S. 109 (1936).

To this general rule, this Court has created only one very limited exception (in only two very specific contexts) – the "complete preemption" doctrine, which holds that if the preemptive force of a federal statute is truly "extraordinary", the statute "converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule". *Caterpillar Inc. v. Williams, supra* at 393. This Court has applied that exception in only two narrow circumstances. *See Avco Corp. v. Machinists*, 390 U.S. 557 (1968) (state law does not exist as an independent source of private rights to enforce collective bargaining contracts); *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987) (state contract and tort claims completely preempted by Employee

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Because both approaches ordinarily produce the same result, the distinction between them is a distinction without a difference in most cases. As a practical matter, therefore, the distinction becomes important only in cases like *Rhymes*, where the distinction may be determinative of the removal jurisdiction of the federal courts. It is for that reason that we have elected to argue the issue in the context presented in *Rhymes*.

Retirement Income Security Act). Eastern's contention that the Warsaw Convention is "exclusive" is an attempt to fit the Convention within this infrequently applied exception to the general rule. In our judgment, neither the express language of the Convention nor the plain import of its legislative history supports the contention.

First, it is clear from the face of the Convention itself that its preemptive effect can only be partial, because the Convention only partially addresses the numerous issues which would necessarily arise in any action to recover damages for death or injury in international air transporation. For example, the Convention contains no provisions governing who the plaintiff shall be, for which beneficiaries of a decedent's estate the plaintiff can recover, or what the elements of damage are. All of that is expressly left to local law, subject to the handful of "conditions and limits" otherwise imposed upon local law by the Convention:

> *Article 24*
>
> (1) In the cases covered by Articles 18 and 19 [damage to goods and delay in transportation] any action for damages, *however founded*, can only be brought *subject to the conditions and limits set out in this convention.*
>
> (2) In the cases covered by Article 17 [death and personal injury] *the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit, and what are their respective rights.*

(Emphasis supplied). *See Floyd, supra* at 1485 n. 40 ("Apart from liability limitations contained in Article 22

of the Convention, the issue of the computation of damages generally is governed by local law, except, of course, where such law conflicts with the Convention.").

As Judge King observed in *Rhymes*, this "however founded" language is entirely antithetical to any notion that the Convention "entirely preempts" the field. In addition to the decisions cited in *Rhymes*, *see In Re Hijacking of Pan American World Airways, Inc., Aircraft, etc.*, 729 F. Supp. 17 (S.D.N.Y. 1990). Other provisions of the Convention also demonstrate, clearly and expressly, that the Convention imposes "conditions and limits" upon local law, rather than "entirely preempting" the field.

For example, Article 22 defers the issue of "periodical payments" to "the law of the court to which the case is submitted". Article 25 *waives* all "provisions . . . which exclude or limit" liability if damages caused by "such default . . . as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct". Article 28 provides that all "[q]uestions of procedure shall be governed by the law of the court to which the case is submitted". Article 29 provides that "[t]he method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted". *See Halmos v. Pan American World Airways, Inc.*, 727 F. Supp. 122 (S.D.N.Y. 1989). And, quite apart from these express references to local law, the Convention simply does not speak to numerous questions which must necessarily be decided by reference to local law – issues like agency, *respondeat superior*, contribution, indemnification, evidence, and so on.

In short, an action to redress a death or injury arising out of an accident in international air transporation finds *most* of its substance in local law, and only "conditions and limits" in the Warsaw Convention – so it is impossible that the Convention "entirely preempts" local law. The proof of the pudding is in Article 25, which removes all the "conditions and limits" of the Convention if "wilful misconduct" is proven – because if "wilful misconduct" is proven in any given case, the cause of action will become almost exclusively an action under local law, and the "conditions and limits" of the Convention will become largely irrelevant. For all of these reasons, evident on the face of the Convention itself, it simply cannot be legitimately argued that the Convention so "entirely preempts" the field that all local law is rendered irrelevant – and it should follow that Judge King's conclusion to that effect in *Rhymes* is legally unassailable.

Eastern argues, in essence, that the need for "uniformity" in this area renders the conclusion reached in *Rhymes* indefensible. However, in our judgment at least, this assertion confuses apples and oranges. To the extent that the Warsaw Convention leaves many issues open to local law, *absolute* "uniformity" was clearly not an object of the Convention. To the extent that the Convention addresses particular aspects of the problem, of course, "uniformity" was clearly an object. But the "uniformity" sought was not "uniformity" of *forum*; it was "uniformity" in the "conditions and limits" to be applied by all courts adjudicating cases governed by the Convention – state, federal, or otherwise. And because state courts fully recognize that the "conditions and limits" of the Convention must be applied to actions brought in state court in

which the Convention governs, "uniformity" in the *law* is fully achieved by virtue of the Supremacy Clause, even if the "well-pleaded complaint rule" is fully enforced.

It is also worth noting that Eastern's position, if adopted, will not even ensure uniformity of forum. Article 28 of the Convention gives a plaintiff a choice of up to four different *countries* in which to bring an action, and if the United States is selected, the plaintiff can make a second-round election between invoking the jurisdiction of a federal court or the concurrent jurisdiction of a state court. To allow removal of a well-pleaded state law claim, as Eastern has effectively urged, will simply add a third round of election between options – and the "uniformity" which Eastern seeks will therefore be defeated each and every time a defendant chooses at the third round *not* to remove a well-pleaded state law claim (which, in our experience, is a not infrequent choice). It would even be open to a defendant sued in multiple cases in a state court, or in various state courts, to frustrate "uniformity" for tactical purposes even further – by removing some of the cases and leaving others alone, in an effort to confuse the outcome with as many inconsistent results as it can obtain, or for delay, or for any other tactical reason which might be served by the exercise of such an option.

It is, incidentally, precisely this type of forum-shopping by *defendants* which the "well-pleaded complaint rule" was purposefully designed to *prevent*:

> It is true that when a defense to a state claim is based on the terms of a collective-bargaining agreement, the state court will have to interpret that agreement to decide whether the state claim survives. But the presence of a federal question,

> even a § 301 question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule – that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in a state court. When a plaintiff invokes a right created by a collective-bargaining agreement, the plaintiff has *chosen* to plead what we have held must be regarded as a federal claim, and removal is at the defendant's option. But a *defendant* cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated. If a defendant could do so, the plaintiff would be master of nothing. Congress has long since decided that federal defenses do not provide a basis for removal.

Caterpillar Inc. v. Williams, 482 U.S. 386, 398-99 (1987).

The third round of forum selection which Eastern has proposed in the name of "uniformity" here clearly runs afoul of this proscription. It also runs afoul of the proposition that "uniformity of forum" is an insufficient motivation, by itself, to justify expanding the statutory jurisdiction of the federal courts. *See Finley v. United States*, 490 U.S. ___, 109 S. Ct. 2003, 104 L. Ed.2d 593 (1989). And the fact that "uniformity" of forum is well nigh impossible to achieve under the Warsaw Convention in any event demonstrates, most respectfully, that "uniformity" is simply not the issue here. The issue here is whether the Warsaw Convention "completely preempts" the field, as Eastern urges – or whether, as *Rhymes* holds,

it only preempts inconsistent local law. As we have demonstrated, the face of the Convention itself is susceptible of only the latter reading.

Eastern has also relied upon several snippets of the Minutes of the Warsaw Convention in purported support of its "complete preemption" argument. These snippets have been taken out of context, however. They relate only to particular provisions under discussion at the time, in which the intention clearly was to preempt particular aspects of local law. On the more general question of whether the Convention was meant to preempt the field entirely, it is both evident from the Minutes, and sometimes express in them, that the intention of the drafters was *not* to write a document which entirely preempted the field, but to write a document which regulated only certain areas of international air law, leaving all unregulated areas to local law. We will have to collect a number of passages from several different places in the Minutes to make this demonstration, so we ask the Court to bear with us. Our references will be to *Minutes, Second International Conference on Private Aeronautical Law, Oct. 4-12, 1929, Warsaw* (translated by R. Horner and D. Legrez, 1975) (hereinafter simply *"Minutes"*).

The concern that the initial working draft of the Warsaw Convention did not cover the entire field first surfaced at the close of the debate upon proposed substantive amendments to the draft. The following occurred:

> THE PRESIDENT: Sirs, we have finished the general discussion on the amendments of first order, amendments of substance. Mr. Giannini has the floor.

MR. GIANNINI (Italy): Sirs, this morning we have been presented with several amendments: one submitted by the Romanian Delegation, one by the Delegation from the USSR, one by the Swiss Delegation and another by the Yugoslav Delegation.

I believe that all our colleagues will be in agreement with me in saying that these are questions of wording, except for the Yugoslav proposal, while there is one part which touches the very substance of the Convention.

The Yugoslav Delegation is preoccupied with the fact that this convention is the first one that we do, and it declares:

> As regards the Convention, the Yugoslav Delegation considers that in order to facilitate the work of national courts, one should add to said convention an article specifying:
>
> 'In the absence of stipulations in the present Convention the analogous provisions of the Bern International Convention of October 23, 1924, concerning the carriage of travelers and baggage by railroad must be secondarily applicable.'

The consequences of this proposal are enormous, because there are so many problems which are envisaged in the Bern Convention and which are not provided for by our Convention that I think that the subsidiary becomes the principal.

Moreover, there are such divergences between the system of our Convention and the general system of the Bern Convention that one cannot take, as subsidiary, a system which is neither analagous [sic] nor parallel.

This is why I believe that, for the moment at least, we have not yet arrived at a system which

is uniform enough to envisage recourse to this subsidiary system.

I want very much to make this declaration, because I believe myself to be one of the people who is the most occupied with air law, and I believe that I am able to say that the interest of air law is to develop freely, not to be oppressed either by maritime law, by terrestrial law, or by the law of railroads.

I implore our colleagues therefore, not to insist on their proposal, because the two ways of thinking are very different.

I would like to ask the Reporter to give us his opinion.

MR. DE VOS, Reporter: The role of Reporter has never been as easy as in this circumstance. First of all, because Mr. Giannini took the floor for him, in a much better way than he would have done; then – and I'm very happy for it – I was able to discuss the Yugoslav proposal with its authors before the meeting, and I came away with the impression that the Yugoslav Delegation, in the presence of this difficulty in applying two different regimes in two matters, does not insist on its proposal.

MR. SIMOVITCH (Yugoslavia): Sirs, despite all the efforts made here by all, in order to give basic principles for decisions of national courts, one cannot provide for all cases, or specify all the details which can arise in the case of carriage.

It's for this reason that the Yugoslav Delegation, with the goal of aiding national courts, made this proposal which would permit them to take the Bern convention as the basis of their decisions.

The Yugoslav Delegation knows that the application of this railroad convention presents difficulties, inasmuch as this convention is not signed by some nations (England, USSR), but it makes the suggestion for the purpose of aiding the efforts of the Assembly.

THE PRESIDENT: Does someone ask the floor on this question? . . .

I put the Yugoslav proposal to a vote.

(The proposal is rejected.)

Minutes, supra at 134-35.

Immediately after the Yugoslav Delegation's proposal was debated and rejected, the Italian Delegation raised a related problem. It pointed out that the draft of the Convention did not purport to regulate carriage on a "friendly" basis, and suggested that it should – since, "if we say nothing it will doubtless always be a more serious system of liability than that of the Convention". *Minutes, supra* at 135. This proposal was shouted down by the delegates, and the Reporter observed, "We must limit our efforts and I fear, indeed that we cannot enter on this road". *Minutes, supra* at 136. Undaunted, the Italian delegate insisted that local law concerning "friendly" carriage was much harsher than the Convention had proposed for commercial carriage, and he proposed that his suggestion should at least be referred to the drafting committee. *Id.* This proposal was adopted, but it apparently died in the committee, because it is not mentioned again in the Minutes. Thereafter, there was a brief discussion of what law should apply in the "cases of non-execution of the contract of carriage", and there was general agreement that "[i]t's the national law which governs the case". *Minutes,*

supra at 172. Neither of these two exchanges satisfied the Yugoslav Delegation's problem, of course, but both of them demonstrate that it was the general understanding that, in areas not regulated by the Convention, local law would govern.

Given this apparent consensus, the Czechoslovakian Delegation proposed an alternative amendment to satisfy the Yugoslav Delegation's concern. The following occurred:

> MR. DE VOS, Reporter: We have an article proposed by the Czechoslovak Delegation as an additional article:
>
> > In the absence of provisions in the present Convention, the provisions of laws and national rules relative to carriage in each State shall apply.
>
> I want to remark that this was provided for: Provided that the case which arises was not provided for in the Convention, it's the common law which is applicable.
>
> I believe therefore, that this provision would be of no use.
>
> MR. GIANNINI (Italy): It was withdrawn.
>
> MR. DE VOS, Reporter: There were two proposals, one from the Czechoslovak Delegation which consisted in applying national law for cases not provided for by the Convention, and then a proposal of the Yugoslav Delegation which concerned the application of the Bern Convention for cases not provided for by the Convention.
>
> MR. GIANNINI (Italy): Following a suggestion made by the German Delegation we are going to

> propose adopting for the [title of the] Convention: "Convention relating to certain rules for the unification of private aeronautical law".
>
> Given that the title indicates the special character of the Convention, the Czechoslovak Delegation no longer insists on its amendment. As to the proposal of applying secondarily the rules of the Bern Convention, it was withdrawn.
>
> THE PRESIDENT: Consequently, the proposals are withdrawn.
>
> MR. DE VOS, Reporter. There is only the wording proposal, concerning the wording of the title.

Minutes, supra at 176.

That the Convention was not an attempt to cover the entire field, but was only an effort to regulate some aspects of international air travel, was thereafter confirmed by the delegates as follows:

> MR. RIPERT (France): In the name of the French Delegation, I have the honor of presenting the following request:
>
> > The conference,
> >
> > Considering that the Warsaw Convention provides only for certain difficulties relating to air carriage and that international air navigation raises many other questions that it would be desirable to provide for by international agreements,
> >
> > Expresses the wish:
> >
> > That, through the offices of the French Government, which has taken the initiative of the convening of these conferences, that

> there be convened subsequently, new conferences which will pursue this work of unification.
>
> . . .
>
> THE PRESIDENT: We are presented with one single proposal: That of the French Delegation. Therefore, I put to a vote the French Delegation's proposal. There is no opposition? . . . The proposal is adopted.

Minutes, supra at 182-83.

When the final draft of the convention was ultimately read for approval, the draft title had been amended to include the word "certain". The following then occurred:

> The first question which was presented to us was that of the drafting of the title. We have adopted the title: Convention for the Unification of Certain Rules Relating to International Carriage by Air".
>
> This suffices to say that this Convention does not provide for the entire matter and gives satisfaction to certain delegations such as the Czechoslovak Delegation, which asked that the word "Certain" be added.

Minutes, supra at 188. It will be remembered that the Czechoslovakian Delegation had accepted this amendment as an appropriate alternative to its proposed amendment – which had made express the notion that the Convention "does not provide for the entire matter", and that local law should govern all issues not expressly regulated by the Convention. This change in the title to accommodate this concern was thereafter adopted by the convention. *Minutes, supra* at 189.

We are left, then, with a single word in the title to the Convention, the word "Certain", which is meant to convey exactly what *Rhymes* holds – that the Warsaw Convention preempts inconsistent local law only in the areas which it expressly covers, and that it was not intended to preempt the entire field. Perhaps that is a lot to extract from a single word, but when the background which generated that single word is considered, there can be no question that that is precisely what it was intended to convey.

In short and in sum, to disagree with *Rhymes* and read *"complete* preemption" into the Warsaw Convention, the Court would have to disregard the express language of the Convention and the plain import of its legislative history. This Court has recently made it clear that it can do neither. *See Chan v. Korean Airlines, Ltd*, 490 U.S. ___, 109 S. Ct. 1676, 104 L. Ed.2d 113 (1989). Because the Warsaw Convention undeniably stops well short of the "complete preemption" theory upon which Eastern's quarrel with *Rhymes* depends, we respectfully submit that *Rhymes* was correctly decided.

CONCLUSION

It is respectfully submitted that the court of appeals' decision should be affirmed.

Respectfully submitted,

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No. 89-1598

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

EASTERN AIRLINES, INC.,
Petitioner,
v.
ROSE MARIE FLOYD and TERRY FLOYD, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

ARGUMENT

I. RESPONDENTS' RELIANCE ON THE ELEVENTH CIRCUIT'S REASONING IS MISPLACED.

A. The Eleventh Circuit's Analysis Is Premised Upon Misconstrued Authorities.

Respondents adopt the Eleventh Circuit's reasoning, found in Section III of the decision, regarding the meaning of "lésion corporelle." However, the Eleventh Circuit's analysis is based primarily on the work of a single commentator. *See* Pet. App. A-14, citing R. Mankiewicz, *The Liability Regime of the International Air Carrier* 145-46 (1981). Mankiewicz' conclusion is, in turn, based upon an incorrectly translated excerpt from a thesis by French commentator, Yvonne Blanc-Dannery, which is completely misleading. Blanc-Dannery wrote:

> . . . L'emploi du terme "lésion" après ceux de mort et de blessure englobe et prévoit les cas de traumatismes ou de perturbations dont les conséquences ne se manifestent pas immédiatement dans l'organisme et dont la corrélation peut être établie avec l'accident.

Y. Blanc-Dannery, *La Convention de Varsovie et les règles du transport aérien internationale* 62 (1933). To support his thesis that "lésion corporelle" comprehends recovery for pure mental injury, Mankiewicz translates Blanc-Dannery's *en cas de traumatismes ou de perturbations* to mean "cases of traumatism and nervous troubles," as follows:

> The use of the expression *lésion* after the words "death" and "wounding" encompasses and contemplates cases of traumatism and nervous troubles, the consequences of which do not immediately become manifest in the organism but which can be related to the accident.

Mankiewicz, supra p. 1, at 146. In fact, as the following definition demonstrates, a respected French dictionary defines "perturbations" as a disturbance or aberration in a bodily organ or function:

> Trouble, dérangement dans l'état ou dans la marche naturelle d'une chose. . . . MED Trouble causé dans les fonctions physiologiques par quelque maladie, et, dans la marche d'une maladie, par quelque agent thérapeutique.

Dictionnaire Encyclopédique Quillet 3557 (R. Mortier ed. 1948).[1] As correctly translated, Blanc-Dannery, in fact, stated:

> The use of the term *lésion* after the words *death* and *wounding* encompasses and contemplates cases of

[1] As translated:

> Disturbance, disorder in the condition or in the natural course of a thing. . . . MED Disturbance caused in the physiological functions by illness, and in the course of an illness, by some therapeutic agent.

> trauma or disorder whose consequences do not immediately manifest themselves in the body but which can be related to the accident.

The physiological connotations of the word "perturbation" demonstrate that Blanc-Dannery was primarily concerned with *latent* injury and not with pure mental injury.

B. The Eleventh Circuit Supported Its Conclusion By Authorities Which Are No Longer Good Law.

Moreover, in support of its conclusion, the decision below cites a line of cases premised upon a now discredited rule of law. In *Husserl v. Swiss Air Transport Co., Ltd.*, 388 F.Supp. 1238 (S.D.N.Y. 1975), the court held that the Warsaw Convention did not create a cause of action but merely imposed certain limitations on state law causes of action. 388 F.Supp. at 1252. The court ruled that "mental injury alone should be compensable, if the otherwise applicable substantive law provides an appropriate cause of action." 388 F.Supp. at 1251. At most, therefore, *Husserl* decided that the Convention does not preclude recovery for pure emotional injury if state law permits recovery. *Husserl* was followed in *Krystal v. British Overseas Airways Corp.*, 403 F.Supp. 1322, 1323 (C.D. Cal. 1975); and *Krystal* was followed in *Karfunkel v. Compagnie Nationale Air France*, 427 F.Supp. 971, 977 (S.D.N.Y. 1977) (erroneously stating that the Warsaw Convention does not create cause of action). Since it is now established that the Warsaw Convention is not merely a limitation upon state law causes of action but in fact creates an independent federal cause of action under the treaty, the proper question is whether the Convention itself permits the action.

C. The Eleventh Circuit Misconstrued The French Legal Meaning Of "Lesion Corporelle."

Respondents repeat the Eleventh Circuit's error in arguing that the French legal meaning *governs* the interpretation of the Warsaw Convention. This Court has specifically held that the French legal meaning does *not*

control, but only provides *guidance* regarding the shared expectations of the contracting parties. French law is studied:

> . . . not because "we are forever chained to French law" by the Convention, . . . but because it is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties. . . . We look to the French legal meaning for guidance as to these expectations because the Warsaw Convention was drafted in French by continental jurists.

Air France v. Saks, 470 U.S. 392, 399 (1985) (citations omitted).

As demonstrated by Eastern in its initial brief, the Eleventh Circuit ignored the distinct physical connotations of the word "lésion" and erroneously determined that an analogy to the French phrase "dommage corporel" was appropriate. Although "dommage corporel" permits recovery for both economic and non-economic damages, the distinct "lésion corporelle" has a narrower meaning in French which is more appropriately translated into "bodily injury." Contrary to the Eleventh Circuit's conclusion, the treaty drafters' specific rejection of "dommage corporel," which would admit recovery for "dommage matériel" or "dommage moral," and their use of the narrower "lésion corporelle," strongly suggests that they specifically intended to limit air carrier liability to "bodily injury" alone.

II. RESPONDENTS RELY ON A NONEXISTENT PRINCIPLE OF TREATY CONSTRUCTION.

The proposition that treaties could be liberally construed "to accommodate the future," *see* Respondents' Brief at page 16, does not state any principle of treaty construction adopted by the Court. Moreover, this contention, if at all instructive, is only justified when a given interpretation reflects the treaty drafters' intent as evidenced by the subsequent conduct of the contracting

parties. *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 35 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976), *reh'g denied*, 429 U.S. 1124 (1977). In the instant case, the contracting parties continue to view Article 17 as precluding recovery for pure mental injury. Indeed, that they have refused to amend the Warsaw Convention to achieve what Respondents argue should be achieved by judicial interpretation supports Eastern's argument that pure mental distress is not compensable under the Convention. Petitioner's Brief at pages 25-26.[2]

Moreover, with regard to such subsequent conduct, Respondents overstate the significance of the change in the official English translation of Article 17 from "bodily injury" to "personal injury" found in the unratified Guatemala City Protocol. As fully discussed in Eastern's initial brief, the delegates at the Guatemala City Conference did not even discuss the issue of whether Article 17 supports an action for pure mental injury. Petitioner's Brief at page 28. Therefore, the incidental changes found in a translation of Article 17 and contained in a Protocol that has not been adopted by this or any other nation does not justify Respondents' argument.

Additionally, even if the change in the English translation of Article 17 could support a broader construction of "lésion corporelle" to include pure mental injury, such broader construction must be viewed in the context of the entire package of proposed amendments to the Convention resulting from the Guatemala City conference. A broader construction of "lésion corporelle" could conceivably be balanced by the Protocol's amendment to Article 17 which specifically immunizes air carriers from liability for passenger injury or death which results solely from the health of the passenger. *Shawcross &*

---

[2] Respondents' argument that mental distress is *physiological* because it is an injury to the brain is equally unavailing. Mental anguish of the type alleged in the instant case is a purely emotional injury which, in the law, continues to be distinguished from physical injury. Prosser and Keeton, *The Law of Torts* § 54 (W. Keeton 5th ed. 1984).

Beaumont, Air Law at ¶ VII (30) (4th ed. 1988). Such a construction could also be balanced by the unbreakable limit on air carrier liability under the Protocol. *Shawcross & Beaumont, supra* p. 5, at ¶ VII (31). To permit liability for pure mental injury without the limits imposed by the Guatemala City Protocol would ignore the delicate balance of liability envisioned by the political branches in the negotiation of these proposed amendments.[3]

III. THE COURT MUST DECLINE RESPONDENTS' INVITATION TO DECIDE ISSUES NOT RAISED IN THE PLEADINGS IN THIS CASE.

Respondents have not alleged that they suffered any physical injury or physical manifestations of psychic injury. As dictated by the allegations in Respondents' own complaint, *see* J.A. 3-9, this case presents the narrow issue of whether pure mental injury, absent physical injury, is compensable under the Warsaw Convention.[4] Eastern maintains that it is not.

The better rule was articulated in *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385, 358 N.Y.S.2d 97, 314 N.E.2d 848 (1974) and *Burnett v. Trans World Airlines, Inc.*, 368 F.Supp. 1152, 1157 (D. N.M. 1973) which held that Article 17 does not permit recovery for pure mental distress absent bodily injury or absent physical manifestations of psychic injury. These decisions focused on Article 17's requirement that damage be "sustained in the event of death or wounding" or of "any other bodily injury suffered by a passenger. . ." Therefore, "mental anguish directly resulting from a bodily injury is damage sustained in the event of a bodily injury." *Burnett*, 368 F.Supp. at 1158. Similarly, "palpable, objective bodily injuries, including those caused by psychic trauma" are compensable. *Rosman*, 34 N.Y.2d at 400, 358 N.Y.S.2d at 110, 314 N.E.2d at 857.[5]

[3] The liability regime established by the Warsaw Convention and the Montreal Agreement provides for absolute carrier liability as a *quid pro quo* for liability limitations. The scheme confers a benefit on passengers by ensuring prompt payment of claims without the need to engage in protracted litigation.

[4] Although the Eleventh Circuit ruled that Respondents Sandy and Gary Dix and Salim and Deborah Khoury could amend their complaint to allege physical injury, *see* Pet. App. A-53-54, the issue before the Court is whether the operative complaint, which alleges only fright and pure emotional injury, states a cause of action under the Warsaw Convention.

IV. RESPONDENTS IMPROPERLY REQUEST THAT THE COURT JUDICIALLY AMEND THE WARSAW CONVENTION IN A MANNER WHICH IS AT ODDS WITH THE DRAFTERS' INTENT.

Respondents invite the Court to ignore the intent of the drafters and the expectations of the parties and judicially amend the Warsaw Convention to conform to what they whimsically view as the better public policy. However, the Court's own decisions regarding proper treaty construction and prudent public policy dictate otherwise.

The potential for frivolous litigation that would be engendered by the Eleventh Circuit's decision is borne out by actual aviation cases. One such case is that of Mr. Michael Schultz, whose claim, although not arising under the Convention, went all the way up to the Seventh Circuit Court of Appeals. As recounted by the court in *Schultz v. American Airlines, Inc.*, 901 F.2d 621 (7th Cir. 1990), Mr. Schultz alleged that the turbulence on an American flight was "so extreme that he was thrown repeatedly against his seat belt and the seat partition causing his spleen to bleed and eventually rupture.

[5] Authorities cited by Respondents that the common law's "impact rule" has been "relaxed" to permit recovery on their claims do not support their argument. *See* Respondents' Brief at page 13. In fact, the *Restatement (Second) of Torts* § 46 (1965) only supports recovery for *intentional* infliction of emotional distress. Section 47 actually *precludes* recovery for emotional distress when the requisite *intent* is lacking. The "impact rule" has not been relaxed to support recovery under the facts of this case. Petitioner's Brief at page 31. *See Prosser and Keeton, supra* p. 5 n.2, at 361 (suggesting, as Eastern maintains, that claims for mental injury require a showing of "definite physical symptoms").

. . ." 901 F.2d at 622. He stated that his seat belt was the only thing which prevented him from being thrown against the ceiling and across the plane. 901 F.2d at 622-23. Every other witness testified that the flight was uneventful and one witness even testified that he "enjoyed the flight very much." The court held that Mr. Schultz had failed to establish his claim. 901 F.2d at 622-23.

The Eleventh Circuit's decision creates a cause of action for a purely subjective and undemonstrable injury which is untempered by the traditional safeguards surrounding an action for pure emotional distress. Under the Warsaw Convention and the Montreal Agreement, air carriers are absolutely liable for passenger "bodily injury" arising out of an "accident" in international transportation. Contrary to Respondents' contention, there is nothing in the Convention's scheme which would enable a court to sort out the trivial from the genuine claims. Respondents' claim that aircraft accidents are "likely to cause severe and genuine fright or mental distress" is not supported by even the facts of this case. Out of all the passengers on board the subject flight, only 26 brought actions alleging severe fright or emotional distress. Moreover, a jury hearing an unreported companion case arising from the same incident found that one passenger suffered no damage at all. *Crespo v. Eastern Airlines, Inc.*, No. 84-0502-Civ-Davis (S.D. Fla. Nov. 3, 1987) (jury verdict of zero damages).[6] Far from being "hyperbolic," Eastern's argument reflects the traditional caution surrounding claims for pure mental injury.[7]

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[6] In *Crespo*, liability was admitted and the only issue was whether the passenger had suffered any damage.

[7] Eastern cannot permit Respondents' glaring inaccuracies and overstatements of law and fact to go uncorrected. First, contrary to Respondents' representation, the Eleventh Circuit did *not* hold that Eastern's conduct, with respect to the subject flight, supports a finding of willful misconduct. The court expressly left that determination for the trial court. Pet. App. A-51-52. Subsequently, the Florida Supreme Court, in a companion case, held that the allegations in Respondents' complaint failed to establish such willful misconduct. *Eastern Airlines, Inc. v. King*, 557 So.2d 574 (Fla. 1990), *reprinted in* Pet. App. C.

Moreover, in their brief, Respondents attempt to change the nature of their own allegations. The allegations in the complaint were that Eastern had failed to take "appropriate" measures, and *not* that Eastern "had done nothing" to correct the alleged problems.

Additionally, Respondents improperly attempt to transform their legal argument into an evidentiary proceeding regarding Eastern's conduct. References to the autobiography of former Eastern President, Frank Borman, are not part of the record and, therefore, must be wholly disregarded. Moreover, the book's generalized comments do not establish that the accident, in the instant case, was specifically caused by any failure in Eastern's management policies.

Another misrepresentation is Respondents' assertion that Article 25 "removes all 'conditions and limits' " of the Convention if willful misconduct is proven. In fact, the courts have consistently held that the only "conditions and limits" which are removed in cases of willful misconduct are those found in Article 22, which limit air carrier liability to certain monetary maximums. *See e.g., Highlands Ins. Co. v. Trinidad and Tobago (BWIA Int'l) Airways Corp.*, 739 F.2d 536, 539 (11th Cir. 1984) (delegates to conference resulting in Hague Protocol understood that Article 25 referred *only* to liability caps of Article 22).

V. THE ISSUE OF THE WARSAW CONVENTION'S EXCLUSIVITY WAS RAISED IN THE PETITION FOR WRIT OF CERTIORARI AND IS FAIRLY INCLUDED WITHIN THE ARTCLE 17 ISSUE RAISED HEREIN.

Eastern objects to Respondents' specious charge that it has "smuggled" the exclusivity question into this case. Respondents' Brief at page 19. The question of the Warsaw Convention's exclusivity was openly presented in its Petition for Writ of Certiorari and fully opposed by Respondents' in their Brief in Opposition. Petition at pages 16-18; Respondents' Brief at pages 10-11. Under the Court's own rules, questions set forth in the *petition*, or fairly included therein, will be considered. Sup. Ct. R. 14.1(a); *Irvine v. People of State of California*, 347 U.S. 128, 129, *reh'g denied*, 347 U.S. 931 (1954) (court will not consider questions not raised in the *petition* for writ of certiorari).

Moreover, the question of the Warsaw Convention's exclusivity is fairly included within the question of whether pure mental injury is compensable. Courts which have read Article 17 broadly have often done so out of a specific concern that damages not comprehended by the Convention may give rise to state-created causes of action not subject to any of the Convention's conditions or limits. *See Floyd*, Pet. App. A-31 (stating that if Article 17 does not encompass emotional trauma, plaintiffs might be able to pursue state law cause of action for intentional infliction of emotional distress); *Husserl*, 388 F.Supp. at 1246-47 (same). Therefore, by demonstrating that the Warsaw Convention is the exclusive source of air carrier liability for damage claims arising out of an accident in international air transportation, Eastern hopes to eliminate what may have compelled the Eleventh Circuit's strained construction of Article 17.[8]

VI. THE WARSAW CONVENTION IS THE UNIVERSAL SOURCE OF AIR CARRIER LIABILITY FOR PASSENGER DEATH OR INJURY RESULTING FROM AN ACCIDENT IN INTERNATIONAL AIR TRANSPORTATION.

The Supremacy Clause of the United States Constitution provides that "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, any thing in the Constitu-

[8] There is conflict among the circuits on the exclusivity of the Warsaw Convention. *Compare In re Mexico City Aircrash of October 31, 1979*, 708 F.2d 400, 414 n.25 (9th Cir. 1983) (federal cause of action not exclusive) *and Tokio Marine and Fire Ins. Co., Ltd. v. McDonnell Douglas Corp.*, 617 F.2d 936, 941-42 (2d Cir. 1980) (same) *with Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 737 F.2d 456, 458-60 (5th Cir. 1984), *cert. denied*, 469 U.S. 1186 (1985) (federal cause of action exclusive); *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979) (Convention provides universal source of a right of action).

tion or Laws of any State to the contrary notwithstanding." U.S. Const. art. VI. Therefore, any state law in conflict with a treaty of the United States is invalid. *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 157-58 (1978). Moreover, even consistent state laws are preempted if federal law evinces the intent to completely preempt or occupy the field. *De Canas v. Bica*, 424 U.S. 351, 356 (1976).

Complete preemption may be expressly stated or implicitly evident in a given federal law or treaty. *Jones v. Rath Packing Co.*, 430 U.S. 519, *reh'g denied*, 431 U.S. 925 (1977); *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 185 (3d Cir. 1986). Complete preemption is implicit when (1) the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for states to supplement it, (2) when federal law touches a field of dominant federal interest leaving no room for state role, or (3) when a multiplicity of state-created substantive rules of law and procedure threaten the federally declared objective of national uniformity. *Commonwealth of Pennsylvania v. Nelson*, 350 U.S. 497, 502, 504, 509, *reh'g denied*, 351 U.S. 934 (1956). Moreover, complete preemption occurs when the application of state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). *See also California Federal Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987) (state law preempted where it stands as an obstacle to the accomplishments of federal objective); *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 368-69 (1986) (same).[9]

[9] By premising their exclusivity argument on the case *Rhymes v. Arrow Air, Inc.*, 636 F. Supp. 737 (S.D. Fla. 1986), the Respondents have framed the exclusivity issue in the narrow *"defensive preemption"* context of removal cases and have distorted the applicable preemption analysis. If, as Respondents suggest, the preemption analysis in removal cases has focused on whether Congress has so pervasively regulated an area that it could be inferred that

Although it was earlier in some doubt, it is now established that the Warsaw Convention creates a cause of action for passenger damage claims arising out of an accident occurring in international air transportation. *Floyd*, Pet. App. A-9; *In re Mexico City Aircrash*, 708 F.2d at 400; *Benjamins*, 572 F.2d at 913. Respondents would argue that, if Article 17 does not permit recovery for pure mental distress, a plaintiff should be able to go outside of the Warsaw Convention and bring a cause of action against an air carrier based on state law. However, the purpose of the cause of action created by the Convention is to provide for uniform liability rules for passenger damage claims. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 256, *reh'g denied*, 467 U.S. 1231 (1984). When uniformity of law is a matter of federal interest, a federal scheme will occupy the field and completely preempt state statutory schemes which provide a multiplicity of differing substantive rules resulting in conflicting and inconsistent adjudications. *Nelson*, 350 U.S. at 502, 504, 509. For example, in holding that state anti-sedition legislation was completely preempted by federal law, the Court in *Nelson* held that the federal interest in substantive uniformity of law precluded the enforcement of the various state laws on the subject:

> A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.
>
> Should the States be permitted to exercise a concurrent jurisdiction in this area, federal enforcement

it intended for federal law to completely preempt or occupy the given field, such a test is narrower than the proper Supremacy Clause analysis applicable to this nonremoval case.

As discussed *supra*, in addition to the pervasiveness of a given regulatory scheme, complete preemption may also be inferred, *inter alia*, from the explicit language of a federal law, from its legislative history, or from the federal goal of national uniformity of substantive result.

> would encounter not only the difficulties mentioned by Mr. Justice Jackson, but the added conflict engendered by different criteria of substantive offenses.

350 U.S. at 509, citing *Garner v. Teamsters, Chauffers and Helpers Local Union No. 776 (A.F.L.)*, 346 U.S. 485, 490-91 (1953).[10] Here, the federal interest of uniformity would be destroyed without compliance with the drafters' desire that the Convention be exclusively applied. To allow a multiplicity of substantive results would completely obviate the purpose and objectives of the Convention. It is precisely for this reason that the framers intentionally left little room for individual states to maneuver. Permitting passenger recourse to state law causes of action for damage claims arising out of an accident in international air transportation therefore impermissibly conflicts with and stands as an obstacle to the Warsaw Convention's goals. *Butler v. Aeromexico*, 774 F.2d 429, 431 (11th Cir. 1985) (state law preempted when it conflicts with tenor of Warsaw Convention); *Boehringer-Mannheim*, 737 F.2d at 459 (Warsaw Convention is exclusive and preempts state law to ensure uniformity intended by drafters); *Abramson v. Japan Airlines Co., Ltd.*, 739 F.2d 130, 134 (3d Cir. 1984), *cert. denied*, 470

[10] The federal interest in substantive uniformity has led to complete preemption of state tort law in analogous federal schemes. For example, the Federal Employers' Liability Act (F.E.L.A.) § 1 *et seq.*, 45 U.S.C. § 51 *et seq.* (1939), supplies the exclusive remedy to employees of railway carriers injured while engaged in the furtherance of interstate and foreign commerce. *Lindgren v. United States*, 281 U.S. 38, 45 (1930) (it is well-settled that "since Congress by the Federal Employers' Liability Act took possession of the field of the employer's liability to employees in interstate transportation by rail, all state laws on the subject are superseded.")

Similarly, the Jones Act, 46 U.S.C. § 688 (1920), extends F.E.L.A.'s applicability to seamen injured in the course of their employment. *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 155 (1964). Because of the federal interest in substantive uniformity, the Jones Act also completely preempts state law. *Gillespie*, 379 U.S. at 154 (Jones Act provides "exclusive right of action . . ., superseding all state death statutes which might otherwise be applied to maritime deaths").

U.S. 1059, *reh'g denied*, 471 U.S. 1112 (1985) (implying that Convention is exclusive and preclusive where there is an archetypical "accident" to which Convention's liability limits specifically apply); *Highlands*, 739 F.2d at 536 n.2 (Warsaw Convention exclusive for claims arising out of international air transportation); *In re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1311 n.8 (9th Cir. 1982) (Warsaw Convention preclusive of state law which conflicts with federal scheme and circumvents liability limits); *Benjamins*, 572 F.2d at 919 (uniformity in international air law can best be recognized by holding that Convention is universal source of a right of action); *Jahanger v. Purolator Sky Courier*, 615 F.Supp. 29 (E.D. Pa. 1985) (Convention is exclusive as to claims arising out of international air transportation); *In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, 535 F.Supp. 833, 844-45 (E.D.N.Y. 1982), *aff'd*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845, *reh'g denied*, 464 U.S. 978 (1983) ("Warsaw Convention specifically controls and exclusively governs any and all claims for damages arising out of the death or injury of a passenger engaged in international air transportation" and liability limitation would have no meaning if plaintiffs could assert independent state law causes of action).

Cases which hold that the Warsaw Convention is not exclusive are unpersuasive because they are either erroneously premised on the view that the Convention does not create a cause of action but only sets conditions and limits on state-created causes of action, *see Halmos v. Pan American World Airways, Inc.*, 727 F.Supp. 122, 123 (S.D.N.Y. 1989); *Husserl v. Swiss Air Transport Co., Ltd.*, 351 F.Supp. 702, 706 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973), or address the exclusivity issue in dicta which is at most incidental to their determination of a wholly unrelated Warsaw Convention issue. *Johnson v. American Airlines, Inc.*, 834 F.2d 721, 723 (9th Cir. 1987) (dicta that state law claims are subject to Convention's limits incidental to holding that human remains constitute "*goods*" under Convention); *In re Mexico City Aircrash*, 708 F.2d at 413 n.24 (dicta regarding non-exclusivity incidental to holding that Convention creates right of action); *Tokio Marine*, 617 F.2d at 942 (dicta relating to non-exclusivity incidental to discussion of whether action under Convention is contractual or tortious in nature for application of indemnity rule).

Moreover, in the instant case, the treaty drafters expressly intended that the Warsaw Convention supply the governing substantive law, precluding recourse to national (that is, local) law. The Convention seeks to regulate "in a uniform manner the . . . *liability* of the air carrier." Warsaw Convention, Preamble (emphasis added). Additionally, Petitioner's Brief at pages 35-38 contains numerous references to framers' comments that recourse to parochial national law be avoided. Moreover, the language of the Convention itself is instructive as to the framers' intent that it be the exclusive cause of action for all international air travel. *See* Warsaw Convention, Article 1 ("This Convention applies to *all* international transportation. . . .") (emphasis added). That the Convention expressly preempts state tort law is also evident from Article 17 which holds the air carrier liable for *any* bodily injury suffered by a passenger.

Complete preemption is further evident in the pervasiveness of the Convention's scheme with regard to air carrier liability. This Court has upheld complete preemption where "the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Nelson*, 350 U.S. at 502. Manifestly, the Convention is replete with detailed references to the elements of a cause of action. *See* Articles 1 (when Convention applies); 17 and 18 (compensable injuries and losses); 20 (contributory negligence); 22 (liability limits); 24 (Convention sets forth exclusive liability rules for cause of action); 25 (willful misconduct and vicarious liability); 27 (wrongful death action on decedent's estate); 28 (subject mat-

ter jurisdiction and procedure); 29 (statute of limitations); 30 (joint and several liability, successive carriers); and 32 (arbitration of claims). Even a superficial reading of the Convention undeniably demonstrates the Convention's pervasive regulation.

Additionally, the Convention is an international treaty. The federal power over the field of foreign affairs is exclusive and state law, being confined to its narrowest limitation, cannot *add to* or take away from a treaty or federal law touching upon that class of laws which concern this nation's relations with other nations or governments. *Hines*, 312 U.S. at 62-63, 66-68.

The now discredited view that the Warsaw Convention does not create a cause of action but merely sets conditions and limits to state-created causes of action is echoed in the distinction drawn by the court in *Rhymes v. Arrow Air, Inc.*, 636 F.Supp. 737 (S.D. Fla. 1986), quoted extensively in Respondents' argument. The plaintiff in *Rhymes* brought an action under Florida's wrongful death law arising out of precisely the type of accident in international air transportation for which the Convention was intended to supply uniform rules. The *Rhymes* decision holds that the Warsaw Convention provides the exclusive *remedy* but not the exclusive *cause of action*. Under *Rhymes*, a plaintiff may, presumably, base his cause of action on either the Convention or on state law, however, any recovery is subject to the Convention's conditions and limitations and conflicting provisions of state law are preempted. However, the *Rhymes* holding that the Convention only preempts conflicting state law wholly begs the question of whether the desired uniformity of air carrier liability can be achieved if plaintiffs in the fifty states can assert state tort claims outside of and substantively different from the cause of action for injury created by Article 17 of the Warsaw Convention.

Recently, another federal judge in the very same Southern District of Florida disagreed with *Rhymes* and

held that the terms of the Warsaw Convention mandate a finding of exclusivity. *Velasquez v. Aerovias Nacionales de Colombia*, —— F.Supp. ——, Nos. 90-1564, 90-1565, slip op. (S.D. Fla. Aug. 28, 1990) (available on Westlaw, 1990 WL 133196), *reprinted in* Reply App. A. *Velasquez* involved an airplane accident where many passengers were killed. The flight originated in Bogotá, Colombia and was destined for New York, New York. The case was filed in state court and removed to the Southern District of Florida. Because the complaints for wrongful death did not mention the Warsaw Convention, the court was faced with whether the action was properly removable.

In its memorandum opinion, the *Velasquez* court conducted an extensive analysis of the terms and purposes of the Convention and of the framers' repeated expressions of preemptive intent and stated:

> Courts and commentators alike are in agreement that the Warsaw Convention had two primary objectives. The first objective was to place a limitation on the potential liability of the airliners [sic] in the event of accidents and lost or damaged goods. *Minutes*,[11] at 37; *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 104 S.Ct. 1776, 80 L.Ed.2d 273 (1984); Andreas F. Lowenfeld and Allan I. Mendelsohn, "The United States and the Warsaw Convention," 80 *Harv. L. Rev.* 497, 498-99 (1967) ("Lowenfeld and Mendelsohn"). The second objective was to establish a uniform system for handling claims arising out of international air transportation. *Minutes*, at 85, 87. The case authority discussing the delegates' desire to achieve such uniformity is abundant.
>
> The delegates' desire to establish an exclusive and uniform liability system in the context of interna-

[11] *Minutes, Second International Conference on Private Aeronautical Law*, October 4-12, 1929, Warsaw (R. Horner & D. Legrez trans. 1975).

tional air travel is vividly illustrated by the following statements:

> *Mr. Ambrosini (Italy)*: We wish that the Convention be applied in all cases, and it is for this reason that I proposed the formula which we have adopted; naturally, one can find something more precise, but it's a question for the drafting committee. In any case, *recourse to national law must be ruled out.* (emphasis supplied).
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> • • • •
>
> *Mr. Ripert (France)*: We will do our best to find the formula which will be satisfactory, but it is agreed that from this point on, *we are absolutely opposed to a formula that would lead to the application of national law.* It's the first time that application of national law is required, and if it were allowed for this question, it would be required for others. From our point of view, one would thus arrive in destroying the Convention, if one establishes recourse to national law upon each article. (emphasis supplied).
>
> We will be as conciliatory as possible on the formula to be adopted; we will develop it as much as possible, but I beg the delegates not to enter upon this dangerous course which would consist in reserving the result of the litigation to national law.

Minutes, at 65-66. Whatever the validity of these objectives today, uniformity and limitation of liability certainly remain integral features of the Warsaw Convention. *Floyd v. Eastern Airlines, Inc.*, 872 F.2d [1462] at 1468 [11th Cir. 1989]. Our decision today seeks to carry out the objectives and spirit of the Warsaw regime.

Velasquez, —— F.Supp. at ——, Reply App. at A-7-9 (footnote omitted).[12]

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[12] Respondents cite Article 24 in support of their position that the Warsaw Convention was only intended to set conditions and limits to locally created causes of action. However, the drafters considered Article 24 to be "the very substance of the Convention, because it excludes recourse to common law" for a cause of action against the carrier. *Minutes*, *supra* p. 17, at 213 (statement of British delegate Sir Alfred Dennis). *See Benjamins*, 572 F.2d at 918 ("however founded" language of Article 24 may have been intended to refer to a number of possible "factual" bases for envisioned action) (emphasis added).

Respondents' sole reliance upon *Rhymes*, one district court case which is based upon a faulty premise and has been criticized by another court in the very same district, demonstrates its lack of validity. Because neither uniformity nor liability limitation can be achieved by permitting recourse to the myriad state law causes of action for claims arising out of an accident in international air transportation, the Court should conclude that the Warsaw Convention is the exclusive source of a right of action for such claims.

Respondents' other references to the Convention's *Minutes* are either taken out of context or unsupportive of their own arguments. For example, the fact that the Yugoslav delegation ignored national law and instead suggested that another international treaty, the Bern Convention, supply supplemental rules to the Warsaw Convention, only proves the fact that the framers intended to establish one international body of uniform supplementary law and did not consider the various laws of the many nations to be appropriate supplements to the Warsaw Convention.

Additionally, the Respondents' discussion of "friendly" or gratuitous carriage does not support their conclusion since such carriage is specifically provided for in Article 1 of the Convention. This is yet another example of the Convention's comprehensiveness.

Respondents' references to other portions of the *Minutes*, *see* Respondents' Brief at pages 35-38, are taken out of context. The delegates' discussion of the Convention's inapplicability was narrowly focused on incidents which do not occur during or arise out of *international carriage* under the Convention. Nor does the word "certain" evince non-exclusivity. The Warsaw Convention expressly applies to "*all* international transportation of baggage, or goods performed by aircraft. . . ." Warsaw Convention, Article 1 (emphasis added). The word "certain" therefore cannot but encompass those "certain rules" relating to air carrier liability for that entire category of claims arising out of *international air transportation.*

CONCLUSION

For the foregoing reasons, Eastern respectfully urges this Court to reverse the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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October 1990

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case Nos. 90-1564-CIV-SCOTT
90-1565-CIV-SCOTT

LUIS FERNANDO VELASQUEZ, as Personal Representative of the Estate of MARIA CECILIA VELASQUEZ, Deceased, and on behalf of JAIME VELASQUEZ, and GUIDO JESUS VELASQUEZ,

Plaintiff,

v.

AEROVIAS NACIONALES DE COLOMBIA, S. A., AVIANCA INC., and COMMODORE AVIATION, INC.,

Defendants.

LUIS FERNANDO VELASQUEZ, as Personal Representative of the Estate of MARIO VELASQUEZ, Deceased, and on behalf of LUIS FERNANDO VELASQUEZ, JAIME VELASQUEZ and GUIDO JESUS VELASQUEZ,

Plaintiff,

v.

AEROVIAS NACIONALES DE COLOMBIA, S. A., AVIANCA INC., and COMMODORE AVIATION, INC.,

Defendants.

MEMORANDUM OPINION

[Filed Aug. 28, 1990]

These actions arise out of a tragic airplane accident which occurred in Cove Neck, New York, on January 25,

1990.[1] As a result of this unfortunate event, the Court is presented with its first opportunity to consider whether the Warsaw Convention, 49 Stat. 3000, reprinted at 49 U.S.C. 1502 (1976)[2] provides the exclusive cause of action for the victims of an international air disaster. Having exhaustively reviewed the record and applicable legal authority, as well as having conducted a hearing on this matter, the Court now renders the following memorandum opinion.[3]

I. FACTUAL BACKGROUND

On January 25, 1990, Avianca Flight 52 departed from Medellin, Colombia.[4] Shortly before its scheduled arrival at John F. Kennedy Airport, Flight 52 crashed in Cove Neck, New York, at approximately 9:30 p.m. As a result of this air disaster, sixty-five passengers were killed and eighty-four passengers were severely injured. As is often the case in accidents of this magnitude, a vast amount of litigation has been initiated in multiple jurisdictions.

As of the date of this Order, forty-three death and personal injury actions have been filed against the defend-

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[1] By Order dated July 25, 1990, the Court consolidated the above-captioned causes of action for the limited purpose of considering the motions for remand filed in each case.

[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, October 12, 1929, adhered to by the United States June 27, 1934, 49 Stat. 3000, 3014, reprinted in 49 U.S.C. note following section 1502. We shall refer to this international treaty by its more popular, and less cumbersome name, the Warsaw Convention.

[3] In addition to counsel of record, Attorney Victor Dias, Jr. of the Podhurst, Orseck law firm appeared, *amicus curiae*, at the August 3, 1990, hearing on behalf of the plaintiffs. The Court has given due consideration to the excellent *amicus curiae* brief.

[4] Flight 52 which originated in Bogota, Colombia, made its first scheduled stop in Medellin, Colombia. From Medellin, the flight was to travel to John F. Kennedy Airport in New York, New York.

ants Aerovias Nacionales de Colombia, S.A., Avianca Incorporated, and Commodore Aviation Incorporated (collectively "AVIANCA"). Of these pending actions, five were filed in the Circuit Court in and for Dade County, Florida.[5] The two actions under present consideration were filed by Luis Fernando Velasquez, the personal representative of the estates of Maria Cecilia Velasquez and Mario Velasquez. Velasquez has grounded each of these actions strictly in terms of Florida's Wrongful Death Act. *See*, Florida Statute, sections 768.16-768.27. In each of the complaints, Velasquez has carefully avoided making the slightest reference to a federal cause of action.

Shortly after these actions were commenced in state court, Avianca sought removal pursuant to 28 U.S.C. 1441, to the United States District Court for the Southern District of Florida. The following represents a compilation of the actions sought to be removed:

1. *Luis Julio Cedial, et al. v. Aerovias Nacionales de Colombia, S.A., Avianca, Inc. and Commodore Aviation Inc.*, 90-1515-Civ-Ryskamp.

2. *Jesus E. Calderon, et al. v. Aerovias Nacionales de Colombia, S.A., Avianca, Inc. and Commodore Aviation Inc.*, 90-1045-Civ-Aronovitz.

3. *Luis Fernando Velasquez, et al. v. Aerovias Nacionales de Colombia, S.A., Avianca Inc. and Commodore Aviation Inc.*, 90-1564-Civ-Scott.

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[5] The remaining actions have been filed in the United States District Courts in and for the Eastern and Southern Districts of New York. By Order dated June 14, 1990, the Judicial Panel on Multidistrict Litigation transferred these actions to the Eastern District of New York for coordinated and consolidated pretrial proceedings pursuant to 28 U.S.C. 1407.

4. *Luis Fernando Velasquez, et al. v. Aerovias Nacionales de Colombia, S.A. Avianca, Inc. and Commodore Aviation Inc.*, 90-1565-Civ-Scott.[6]

In essence, Avianca asserts that these actions are properly removed to federal court as a result of the exclusivity of the Warsaw Convention—that is, the Warsaw Convention provides *the sole cause of action* under which the victim of an international air disaster may proceed. Conversely, the plaintiffs allege that the Warsaw Convention merely provides *the exclusive remedy* for such victims—that is, it does not prescribe the exclusive cause of action.[7] Fully cognizant of the depth of emotion that such tragedies naturally invoke, we now proceed to consider the legal basis of plaintiff's motion for remand.

II. LEGAL ANALYSIS

The actions under consideration present difficult questions regarding interpretation of the Warsaw Convention. These questions have come to fruition as a result of Avianca seeking removal of these actions to federal court pursuant to 28 U.S.C. section 1441.[8] To properly address

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[6] The fifth case filed in the Circuit Court in and for Dade County, Florida, which Avianca has not sought to remove to federal court is: *Jose Daniel Telles et al. v. Aerovias Nacionales De Colombia, S.A., Avianca Inc., and Commodore Aviation, Inc.*, 90-27476. Removal was not sought as this case involves the death of a crew member aboard Avianca flight 52.

[7] By Order dated May 23, 1990, Judge Aronovitz, relying exclusively upon Chief Judge James Lawrence King's decision in *Rhymes v. Arrow Air, Inc.*, 636 F.Supp. 737 (S.D. Fla. 1986), granted plaintiff's motion to remand filed in Case No. 90-1045. However, in his Order, Judge Aronovitz did recognize authority holding to the contrary.

[8] This statutory provision provides in pertinent part as follows:

Section 1441, Actions removal generally:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

the questions that have arisen, it is essential that the Court consider, at the outset, the history and intent behind the Warsaw Convention.

(A). History Of The Warsaw Convention

The Warsaw Convention is an international treaty to which both Colombia and the United States are signatories. In fact, most of the major countries of the world whose airlines have international routes have chosen to adhere to the terms of this treaty. *See*, Lee S. Kreindler, 1 Aviation Accident Law section 11.01[3] at 11-7 (1988) (listing those countries which are signatories of the Warsaw Convention); Lawrence B. Goldhirsch, *The Warsaw Convention Annotated: A Legal Handbook*, (1988); *In Re Aircrash In Bali, Indonesia On April 22 1974*, 684 F.2d 1301 (9th Cir. 1982). The Warsaw Convention was the result of two international conferences held in Paris, France in 1925 and Warsaw, Poland in 1929. The United States declined an invitation to participate in the drafting of the Convention. However, the United States did appoint two representatives, John Ide and McCeney Warlich, to observe the proceedings. Following ratification by several countries, the United States eventually pronounced its adherence to the Warsaw Convention in 1934. On June 15, 1934, the Senate approved the Convention by voice vote. 78 Cong. Rec. 11,582 (1934); *see*, Lowenfeld and Mendelsohn, 80 *Harv. L. Rev.* at 502.

From the outset, the Warsaw Convention provoked a great deal of debate and dissatisfaction among the majority of signatory countries, including the United States. *See*, Lowenfeld and Mendelsohn, 80 *Harv. L. Rev.* at 502. Especially bothersome was the limitation on liability set forth in Article 22 of the Convention. In an effort to eradicate this dissatisfaction, the signatories to the Convention met at the Hague in 1955. This meeting, known as the Hague Protocol, had the effect of increasing the limitation of liability to approximately $16,600 in American currency.[9] *Hague Protocol Art. XI*, reprinted in Andreas F. Lowenfeld, *Aviation Law Documents Supp.* 958-59 (2d Ed. 1981). Eleven years later the Montreal Agreement was enacted.[10] This Agreement increased the limitation on liability to $75,000 in American currency. Since the time of Montreal, additional international conferences have been convened in attempt to revise the terms of the Warsaw Convention. However, the United States has chosen to abide by the Warsaw Convention, as modified by the Montreal Agreement. *See, Floyd v. Eastern Airlines, Inc.*, 872 F.2d at 1469; Stuart M. Speiser and Charles F. Krause, 1 *Aviation Tort Law* section 11.20 at 680-83 (1978 and 1988 Supp.).

At the time the Warsaw Convention was convened in October 1929, commercial air travel was in its infancy.[11]

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[9] The United States has never adhered to the Hague Protocol.

[10] Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18900, approved by CAB Order No. E-28680, May 13, 1966, 31 Fed.Reg. 7302 (1966).

[11] "The total airline operations in the five-year period 1925-1929 —domestic as well as foreign travel—were only 400 million passenger miles. The fatality rate was 45 per 100 million passenger miles. This compares with the rate of 0.55 fatalities per 100 million passenger miles in 1965. 1965 Annual Report of the ICAO Council to the ICAO Assembly 13. The larger airlines could carry 15 to 20 passengers at cruising speeds of about 100 miles per hour and over stages of about 500 miles. The most advanced and popular United States aircraft, the Lockheed Vega, which carried six passengers and a pilot, had a cruising speed of about 120 miles per hour and a range of about 500 miles. . . ." Lowenfeld and Mendelsohn, "The United States and the Warsaw Convention," 80 *Harv. L. Rev.* 497, 498 (1967).

In fact, Charles Lindbergh had flown "The Spirit of St. Louis" across the Atlantic Ocean only two years before in 1927. The sole international airliner conducting business in the United States at that time operated flights between Havana, Cuba and Key West, Florida. *Block v. Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967); Wright, "The Warsaw Convention's Damage Limitations," 1957 *Clev.-Mar. L. Rev.* 290-91. Although commercial air travel was just a burgeoning industry at though commercial air travel was just a burgeoning industry at this time, "[c]ommon rules to regulate international air carriage [h]ad become a necessity." *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462 (11th Cir. 1989); *Minutes*, "Second International Conference on Private Aeronautical Law," October 4-12, 1929, Warsaw 13 (English translation by Robert C. Horner and Didier Legres 1975) ("Minutes") (address of Mr. Lutostanski, head of the Polish delegation). As a result of such necessity, the Warsaw Convention was adopted.

Courts and commentators alike are in agreement that the Warsaw Convention had two primary objectives. The first objective was to place a limitation on the potential liability of the airliners in the event of accidents and lost or damaged goods. *Minutes*, at 37; *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 104 S.Ct. 1776, 80 L.Ed.2d 273 (1984); Andreas F. Lowenfeld and Allan I. Mendelsohn, "The United States and the Warsaw Convention," 80 *Harv. L. Rev.* 497, 498-99 (1967) ("Lowenfeld and Mendelsohn"). The second objective was to establish a uniform system for handling claims arising out of international air transportation. *Minutes*,

at 85, 87. The case authority discussing the delegates' desire to achieve such uniformity is abundant.[12]

The delegates' desire to establish an exclusive and uniform liability system in the context of international air travel is vividly illustrated by the following statements:

> *Mr. Ambrosini* (*Italy*): We wish that the Convention be applied in all cases, and it is for this reason that I proposed the formula which we have adopted; naturally, one can find something more precise, but it's a question for the drafting committee. In any case, *recourse to national law must be ruled out.* (emphasis supplied).
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> *Mr. Ripert* (*France*): We will do our best to find the formula which will be satisfactory, but it is agreed that from this point on, *we are absolutely opposed to a formula that would lead to the application of national law.* It's the first time that application of national law is required, and if it were allowed for this question, it would be required for others. From our point of view, one would thus arrive in destroying the Convention, if one establishes recourse to national law upon each article. (emphasis supplied).
>
> We will be as conciliatory as possible on the formula to be adopted; we will develop it as much as possible, but I beg the delegates not to enter upon this dangerous course which would consist in reserving the result of the litigation to national law.

Minutes, at 65-66.

Whatever the validity of these objectives today,[13] uniformity and limitation of liablity certainly remain integral features of the Warsaw Convention. *Floyd v. Eastern Airlines, Inc.*, 872 F.2d at 1468. Our decision today seeks to carry out the objectives and spirit of the Warsaw regime.

(B). Does The Warsaw Convention Create A Cause Of Action

Prior to considering the exclusivity of the Warsaw Convention, the Court must first determine whether the Convention creates a cause of action for death and personal injury actions. Immediately following enactment of the Convention, many of the courts and commentators that considered this question acknowledged the creation of a cause of action thereunder. *See, Salamon Koninklijke Luchtvaart Maatschappij, N.Y.*, 107 N.Y.S.2d 768 (Sup.Ct. 1951), *aff'd mem*, 281 App.Div. 965, 120 N.Y.S.

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[12] *Reed v. Wiser*, 555 F.2d 1079, 1090 (2nd Cir.) cert. denied, 434 U.S. 922, 98 S.Ct. 399, 54 L.Ed.2d 279 (1977) ("[A] fundamental purpose of the signatories to the Warsaw Convention, which is entitled to great weight in interpreting that pact, was their desire to establish *a uniform body of world-wide liability rules* to govern international aviation, which would supersede with respect to international flights the scores of different domestic laws, leaving the latter applicable only to the internal flights of each of the countries involved") (emphasis supplied); *Benjamins v. British European Airways*, 572 F.2d 913 (2nd Cir. 1978); *In Re Aircrash In Bali, Indonesia On April 22, 1974*, 684 F.2d at 1304-1305; *Boehringer-Mannheim Diagnostics v. Pan Am World*, 737 F.2d 456 (5th Cir. 1984); *Harpalani v. Air India, Inc.*, 622 F. Supp. 69 (D.C. Ill. 1985); *St. Paul Ins. Co. v. Venezuelan Intern. Airways*, 807 F.2d 1543 (11th Cir. 1987); *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462 (11th Cir. 1989); *Eggink v. Trans World Airlines, Inc.*, No. 87-3403 (S.D.N.Y. 1990) (available on Lexis July 27, 1990) ("A central purpose of the Convention is to promote international air travel and transport by establishing uniformity with respect to the liability of carriers").

[13] *See*, Kreindler, 1 *Aviation Accident Law* section 11.01[6] at 11-13; *Comment*, "Warsaw Convention Liability Limitations: Constitutional Issues, 6 Nw. J. Int'l. L. & Bus. 896 (1984); *Comment*, "The Growth of American Judicial Hostility Towards the Liability Limitations of the Warsaw Convention," 48 J. Air L. & Com. 805 (1983).

2d 917 (1st Dept. 1953); Lowenfeld and Mendelsohn, 80 *Harv. L. Rev.* at 517.

This consensus of judicial construction, however, was shortlived. In the mid-1950's the Second Circuit handed down two seminal opinions in which it was concluded that the Convention failed to create a cause of action. *Komlos v. Compagnie Nationale Air France*, 209 F.2d 436 (2nd Cir.), *cert. denied*, 348 U.S. 820, 75 S.Ct. 31, 99 L.Ed.2d 646 (1954); *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677 (2nd Cir.) *cert. denied*, 355 U.S. 907, 78 S.Ct. 334, 2 L.Ed.2d 262 (1957). Thereafter, for over two decades, these two decisions were followed by courts throughout the country. *Maugnie v. Compagnie Nationale Air France*, 549 F.2d 1256, 1258, n.2 (9th Cir.), *cert. denied*, 431 U.S. 974, 97 S.Ct. 2939, 53 L.Ed.2d 262 (1957).

In 1978, however, the Second Circuit was presented with the opportunity to reconsider the logic it previously employed in deciding the *Komlos* and *Noel* cases. On this occasion, giving great deference to the objective of the Warsaw regime, the Second Circuit reversed its prior reasoning by recognizing a cause of action for death and personal injury actions. *Benjamins v. British European Airways*, 572 F.2d 913 (2nd Cir. 1978), *cert. denied*, 439 U.S. 1114, 99 S.Ct. 1016, 59 L.Ed.2d 72 (1979). Other circuits soon adopted this analysis. *See, Boehringer-Manheim Diagnostics, Inc., v. Pan American World Airways, Inc.*, 737 F.2d at 458; *Abramson v. Japan Airlines Co.*, 739 F.2d 130 (3rd Cir. 1984), *cert. denied*, 470 U.S. 1059, 105 S.Ct. 1776, 94 L.Ed.2d 895 (1985), *Schroeder v. Lufthansa German Airlines*, 875 F.2d 613, 620 n.5 (7th Cir. 1989); *In re Mexico City Aircrash*, 708 F.2d 400 (9th Cir.1983). In *Floyd v. Eastern Airlines, Inc.*, the Eleventh Circuit, presented with an opportunity to consider this question, concluded that the Warsaw Convention does create a cause of action in personal injury and death cases. *Floyd v. Eastern Airlines, Inc.*, 872 F.2d at 1470.[14] Thus, although this issue has been the subject of somewhat inconsistent analysis during the course of its development, it has been squarely addressed and resolved within this circuit.

(C). Is The Cause Of Action Created By The Warsaw Convention Exclusive

Having determined that the Warsaw Convention creates a cause of action, we now turn to the more difficult question of whether such an action is exclusive to the victims of international air disasters. This question is of great importance to aviation litigation and is considered by this Court for the first time. Given the progression of the case authority, as well as the overriding objective of the Convention to establish a uniform system of liability, we are compelled to hold that the Warsaw Convention provides the exclusive cause of action in cases such as this.[15]

The exclusive nature of the Convention is initially evidenced by those cases involving claims for lost baggage and damaged goods. In such cases, the Warsaw Convention directs its reader to Articles 18 and 24(1). These provisions state, in pertinent part, as follows:

> *Article 18*: (1). The carrier shall be liable for damage sustained in the event of the destruction or loss

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[14] The United States Supreme Court has not expressly decided this question. *See, Air France v. Saks*, 470 U.S. 392, 105 S.Ct. 1338, 84 L.Ed.2d 289 (1985); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 104 S.Ct. 1776, 80 L.Ed.2d 273 (1984); *Chan v. Korean Air Lines, Ltd.*, 490 U.S. ——, 109 S.Ct. 1676, 104 L.Ed.2d 113 (1989).

[15] The Court recognizes that its opinion today is contrary to the holding reached by Chief Judge King in *Rhymes v. Arrow Air, Inc.*, 636 F. Supp. 737 (S.D. Fla. 1986). However, having thoroughly considered the reasoning employed in *Rhymes* the Court must respectfully disagree and reach a contrary conclusion.

of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

. . . .

Article 24: (1). In the cases covered by articles 18 . . . . any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.[16]

. . . .

Upon consideration of the foregoing provisions, courts have unanimously held that the Warsaw Convention *provides the exclusive cause of action* in lost baggage and damaged goods cases. *See e.g., Jahanger v. Purolator Sky Courier*, 615 F.Supp. 29 (D.C. Pa. 1985); *Rucumar Inc. v. KLM Royal Dutch Airlines*, 608 F.Supp. 795, 797-98 (D.C.N.Y. 1985) ("The exclusivity of the Warsaw Convention to any claim for damages arising out of international transportation is established in Article 24 of the Convention"); *Stanford v. Kuwait Airlines Corp.*, 705 F.Supp. 142-143 (S.D.N.Y. 1989) ("The terms of the Warsaw Convention exclusively govern the rights and liabilities of the parties . . . ."). In particular, the Eleventh Circuit has stated that "[t]he Warsaw Convention creates the cause of action . . . . . and is the exclusive remedy against international air carriers for lost or destroyed cargo." *St. Paul Ins. Co. v. Venezuelan Intern. Airways*, 807 F.2d 1543 (11th Cir. 1987). Having so stated, the question then becomes whether this exclusivity finding should extend to personal injury and death cases.

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[16] In order to ensure uniformity of interpretation, which was one of the paramount objectives of the Convention, the text of the Warsaw Convention was "drawn up in French in a single copy," *Article 36*. The English version used here was originally published in a Treaty Information Bulletin of the Department of State in March 1934. 78 *Cong. Rec.* #115 77-82 (1934).

Such cases are governed by Articles 17 and 24(2) of the Warsaw Convention.[17] The majority of courts to address this issue have found the cause of action prescribed under the Warsaw Convention to be exclusive in such cases.[18] *See, Abramson v. Japan Airlines Co., Ltd.*, 739 F.2d 130, 134 (3rd Cir. 1984) (court indicated that it would hold the Convention to be the exclusive basis for recovery), *cert. denied*, 470 U.S. 1059, 105 S.Ct. 1776, 84 L.Ed.2d 835 (1985); *Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 737 F.2d 456, 459 (5th Cir. 1984); *Benjamins v. British European Airways*, 572 F.2d at 919 ("[T]he desirability of uniformity in international air law can best be recognized by holding that the Convention, otherwise universally applicable, is also the universal source of a right of action"). In this regard, the court in *In Re Air Crash Disaster At Warsaw, Poland, Etc.*, stated the following:

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[17] These Articles provide as follows:

Article 17: "The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

Article 24(2): "In the cases covered by article 17 the provisions of the preceding paragraph [Article 24(1)] shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights."

[18] The Eleventh Circuit Court of Appeals has not expressly decided this issue. However, in *Floyd v. Eastern Airlines, Inc.*, the Court did provide a degree of insight to this question when construing *Burnett v. Trans World Airlines, Inc.*, a psychic injury case it stated:

"[T]he plaintiffs' action in *Burnett* was founded on state law, . . . not on the Warsaw Convention itself, which also places its conclusion on somewhat uncertain footing."

Floyd v. Eastern Airlines, Inc., 872 F.2d at 1477.

> "[T]he Warsaw Convention specifically controls and exclusively governs any and all claims for damages arising out of the death or injury of a passenger engaged in international air transportation, and plaintiffs cannot maintain a separate wrongful death action for damages under [state] law."

In Re Air Crash Disaster At Warsaw, Poland, Etc., 535 F.Supp. 833, 844-45 (E.D.N.Y. 1982), *aff'd*, 705 F.2d 85 (2nd Cir.). In so holding, these courts have emphasized the Convention's overriding concern for uniformity and the avoidance of overwhelming chaos that would otherwise result.

Given this concern for uniformity, it would make little sense to hold that the Convention allows separate state law causes of action to supersede its exclusivity. In this country alone, such a holding would expose air carriers to fifty (50) separate and distinct causes of action for wrongful death. Obviously, such a result would fatally impair the Convention's ability to provide for both the *substantive and procedural* uniformity envisioned by its drafters. In addition, a holding that abandons the primary objective of uniformity would undoubtedly open the floodgate to both plaintiff forum shopping and inconsistent verdicts. Such devistating consequences would not only serve to ignore but would ultimately destroy the intent of the Convention's drafters.

(D). Jurisdiction Over The Warsaw Convention

Although the Court concludes today that the Warsaw Convention creates the exclusive cause of action in wrongful death cases, we recognize that there exists concurrent jurisdiction. A plaintiff may file an action brought pursuant to the Warsaw Convention in either federal or state court. *See e.g., Eastern Airlines, Inc. v. King*, 557 So.2d 574 (Fla. 1990); *Schmoldt Importing Company v. Pan American World Airways, Inc.*, 767 P.2d 411 (Ok. 1989); *Maro v. Aerolineas Argentinas*, 535 N.Y.S.2d 982

(N.Y. App. Div. 1988); *Arkin v. New York Helicopter Corp.*, 21 Avi. 17, 679 (N.Y. S.Ct. 1988); *Nahm SCAC Transport, Inc.*, 522 N.E.2d 531 (Ill. App. Ct. 1988); *Newsome v. Trans International Airways*, 492 So. 2d 592 (Ala. 1986). However, should the plaintiff choose to file his action in state court, the option of removal then becomes available to the defendant.

III. CONCLUSION

The rapid evolution of air travel has provided a unique ability to quickly transcend national boundaries and the laws which pertain therein. Such a reality necessitates the existence of uniform regulation. To hold otherwise would remove the cause of action available to the international traveler from the rule of reason to the realm of mere fortuity. Accordingly, based upon the foregoing analysis and the authorities cited therein, it is hereby ORDERED and ADJUDGED as follows:

1. The Motion For Remand filed in each of the above-styled actions is DENIED. The Court finds that these actions are properly removed.
2. The Court is of the opinion that this decision involves controlling questions of law as to which there is ground for a difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation within the meaning of 28 U.S.C. 1292(b).[19]

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[19] This statutory provision states in pertinent part as follows: *Section 1292. Interlocutory decisions*:

"(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such ac-

Therefore, the issues decided herein are certified for interlocutory appeal.

3. Proceedings in this Court are stayed for ten (10) days. Either before or at that time, plaintiff shall advise the Court whether it will appeal.

DONE and ORDERED in Chambers, at Miami, Florida, this 28th day of August, 1990.

/s/ Thomas E. Scott
THOMAS E. SCOTT
United States District Judge

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Michael K. McLemore, Esq.
Valerie Shea, Esq.
Victor Diaz, Jr., Esq.

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tion may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.